Supreme Court U.S.
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No. 06- 06-173

IN THE

Supreme Court of the United States

SAN CARLOS APACHE TRIBE,

Petitioner,

v.

STATE OF ARIZONA; GILA RIVER INDIAN COMMUNITY; ASARCO LLC; PHELPS DODGE INCORPORATED; SAN CARLOS IRRIGATION AND DRAINAGE DISTRICT; CITY OF SAFFORD; GILA VALLEY IRRIGATION DISTRICT; FRANKLIN IRRIGATION DISTRICT; SALT RIVER PROJECT; CITY OF GOODYEAR; BHP COPPER INCORPORATED, AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ISSUE 1: Where the United States as trustee for the San Carlos Apache Tribe, and the Apache Tribe on its own behalf, were required by this Court to adjudicate all the Tribe's federal reserved, aboriginal and other water rights in Arizona's general stream adjudication under the McCarran Amendment, 43 U.S.C. § 666, and where opposing claimants in the general stream adjudication raised the affirmative defense of *res judicata* in motions for summary judgment arguing that a previous federal consent decree on the Gila River precluded the United States and the Tribe from adjudicating water rights to the Gila River mainstream for the Apache Reservation, did the Arizona Supreme Court err where it assumed the existence of privity and affirmed the trial court's decision on *res judicata*, concluding as a "matter of federal law" that comity compelled the Apache Tribe to present its defenses to *res judicata* in the federal district court which entered the prior consent decree?

ISSUE 2: Does it violate the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution to apply the **affirmative defense** of *res judicata* to preclude the United States as trustee for a federally recognized Indian Tribe, and the Tribe on its own behalf, from adjudicating certain federal reserved, aboriginal and other water rights in a state general stream adjudication conducted under the McCarran Amendment, without allowing the Indian Tribe to present its **defenses** to *res judicata* in the state forum in which it was raised?

PARTIES TO THE PROCEEDING

This Petition for writ of certiorari arises out of Arizona's general stream adjudication, *In re the General Stream Adjudication of All Rights to Use Water in the Gila River System and Source*, W-1, W-2, W-3, W-4 (consolidated) ("Gila River Adjudication").[1] The Gila River Adjudication involves more than 27,000 parties and over 77,000 claims. *See San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 186 (Ariz. 1999). The United States was joined as a party pursuant to the McCarran Amendment, 43 U.S.C. § 666, for itself and as trustee for sixteen Arizona Indian Tribes, including Petitioner, the San Carlos Apache Tribe ("Apache Tribe" or "Tribe), a federally recognized Indian Tribe, recognized pursuant to the Apache Treaty, July 1, 1852, 10 Stat. 979 (App. 294a), and organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476 *et seq.*

The Respondents are those claimants in the Gila River Adjudication in the Maricopa County Superior Court who filed a notice of appearance and participated in the proceedings before the Supreme Court of Arizona from which this Petition arises, case number WC-02-0003-IR [Contested Case No. W1-206]. These Respondents are the United States of America; the State of Arizona; the Gila River Indian Community; ASARCO LLC; Phelps Dodge Incorporated; San Carlos Irrigation and Drainage District; the City of Safford; Gila Valley Irrigation District; Franklin Irrigation District; Salt River Project; City of Goodyear; and BHP Copper Incorporated.

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1. The Gila River Adjudication is the consolidated action to adjudicate *inter sese*, water rights, including federally protected Indian water rights, to the Upper Salt, Verde, Upper Gila, Lower Gila, Agua Fria, Upper Santa Cruz and San Pedro watersheds in Arizona.

Thousands of parties have filed claims in the underlying Gila River Adjudication before the Maricopa County Superior Court, but have **not** filed a notice of appearance or participated in the Interlocutory Appeal before the Arizona Supreme Court in WC-02-0003. These additional claimants are not designated Respondents to this Petition under the Rules of the Supreme Court of the United States.

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Petitioner, the San Carlos Apache Tribe, respectfully requests that this Court grant its Petition and issue a writ of certiorari to review the decision of the Arizona Supreme Court entered on February 6, 2006, and the Order Denying Motion for Reconsideration entered on May 3, 2006 (collectively the "decision below"), where the Arizona Supreme Court conclusively ruled that the United States as trustee for the Apache Tribe, and the Tribe on its own behalf, are precluded under the doctrine of *res judicata* from adjudicating the Tribe's federal reserved, aboriginal, and other water rights claims to the mainstream of the Gila River in the Gila River Adjudication,[2] and further, that the Apache Tribe is barred by general principles of comity from presenting its defenses to *res judicata* in the Gila River Adjudication, the forum in which the **affirmative defense** of *res judicata* was originally raised.

OPINIONS BELOW

The original Opinion and Order of the Arizona Supreme Court (App. 1a-53a) is reported in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 127 P.3d 882 (2006) ("*Gila VI*"). The Order Denying Motion

2. The Apache Tribe owns water rights separate and of a different character than those rights "reserved" for the Apache Reservation by the United States. Federal reserved rights are those rights reserved by the United States with a priority at least as early as the date on which the reservation was created, as may be necessary to accomplish the federal purposes of the Reservation. *See Winters v. United States*, 207 U.S. 564 (1908). Aboriginal rights are those rights reserved or retained by the Tribe **unto itself**. *See United States v. Winans*, 198 U.S. 371 (1904); *Winters*, 207 U.S. at 576. The aboriginal rights of the Apache Tribe to the Gila River have never been ceded or extinguished. In addition, the Tribe owns prior appropriative rights on the Gila River under the doctrine of prior appropriation. *See* Statement of Claimant for by the Apache Tribe (Supplemental Appendix ("Supp. App.") 42-66). These water rights are owned by the Apache Tribe pursuant to the Law of Nations, as well as under Spanish, Mexican, and American law. Though not yet "quantified", these water rights are real, "present," and "perfected." *See Arizona v. California*, 373 U.S. 546, 600 (1963) ("*Arizona I*").

for Reconsideration (App. 54a-61a) is reported in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 134 P.3d 375 (2006). The Superior Court's May 17, 2002, Minute Entry Order in Contested Case W1-206 (App. 62a-65a), the Superior Court's March 7, 2002, Amended Order adopting the Special Master's Report and Recommendation on the claims to the Gila River by and for the Gila River Indian Community ("GRIC") in Contested Case W1-203 (App. 66a-107a), and the June 30, 2000, Special Master's Report and Recommendation in Contested Case W1-203 (App. 108a-211a), are all unpublished decisions. These decisions are reprinted in the Appendix to this Petition.

JURISDICTION

The decision of the Arizona Supreme Court was filed on February 6, 2006. The decision of the Arizona Supreme Court denying the Apache Tribe's Motion for Reconsideration was filed on May 3, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant Constitutional and Statutory Provisions cited in this Petition are set forth in the Appendix at App. 284a-288a.

STATEMENT OF THE CASE

The creation story of the Apache People in their ancestral lands places them in what is now Arizona from the beginning of life on Earth. The aboriginal territory of the Apache People was vast and full of abundant resources, including water. In 1872, the San Carlos Apache Tribe was confined to a larger Reservation of several million acres in what is now New Mexico and Arizona. Since this time, the San Carlos Apache Reservation ("Reservation") has been reduced to approximately 2 million acres. Today, the Apache Tribe (with a population of almost 13,000 members) struggles to exist within the confines of this much smaller land base, and while these lands are generally harsh and arid, the Reservation remains the "permanent home

and abiding place" for the Apache People. *See Winters*, 207 U.S. at 565.

The Gila River runs for 40 miles through the very heart of the Reservation, with nearly 1,500,000 acres in the Gila River drainage. *See* Map of the San Carlos Reservation and Gila River (Supp. App. 1).[3] The presence of the Gila River was a primary reason for the original boundaries of the Reservation.[4]

The waters of the Gila River mainstream are absolutely essential to the future of the Tribe. It is among the very poorest, if not the poorest ethnic group in the United.[5] Upstream and downstream, the non-Indian communities prosper on over 50,000 acres of verdant lands legally and illegally watered by the Gila River mainstream. Downstream from the Reservation over 100,000 acres of lands may be irrigated as part of the United States' project, known as the San Carlos Irrigation Project ("SCIP"). Within the Reservation is San Carlos Reservoir. The Apaches are not allowed to use the water in this Reservoir under the *Globe Equity Decree*.[6] Yet the Gila River flows through lands of the Apache Reservation which are so scorched and dry

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3. Like the Fort Belknap Reservation in *Winters*, 207 U.S. at 577, the lands of the Apache Reservation are also "arid and, without irrigation, . . . practically valueless."

4. *See* Annual Report of the Commissioner of Indian Affairs, November 30, 1857, 35th Congress, First Session at 583.

5. The Federal District Court charged with enforcing the 1935 federal consent decree on the Gila River known as the "*Globe Equity No. 59 Decree*" ("*Globe Equity Decree*") has observed "[t]o say that the Tribe is poor is to severely understate the plight of the Apaches. The infant mortality rate is seven times the national average. Malnutrition abounds. Housing varies from inadequate to non-existent, as does running water and electricity. Unemployment is not just rampant, it is the rule; the exceptions are the two in ten Apaches who have work." *United States v. Gila Valley Irrigation District*, 801 F. Supp. 1, 4 (D. Ariz. 1992) (internal citation omitted).

6. The construction of Coolidge Dam and San Carlos Reservoir on the Apache Reservation destroyed the town of Old San Carlos, as well as the flour mill, farms, homes, family cemeteries and religious sites of many Apaches within its path.

that one is stunned by the contrast at the boundary. No marker, sign or fence is necessary. On one side, the waters of the Gila mainstream are used by the non-Indians. On the Apache side, the River runs through, but its waters are unavailable to quench the thirst or to remedy the acute poverty and despair of the Apache People.

Water and prosperity are inseparable in Arizona. This Court's decisions in *Winans*, *Winters*, *Arizona I*, and its expectations for Arizona's stream adjudication are rendered a mockery by the conditions on the Apache Reservation today. The Tribe must be able to use the waters of the Gila River mainstream if conditions for the Apache Tribe are ever to improve.

In 1983, this Court required the United States to present **all claims** for federal reserved water rights for the Apache Reservation in Arizona's general stream adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666. *See Arizona v. San Carlos*, 463 U.S. at 571.[7] Having required the United States to adjudicate its federally reserved water rights for the Apache Reservation in a **state** forum, this Court warned that state courts like Arizona, "have a solemn obligation to follow federal law . . .", and further promised:

> [A]ny state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a **particularized and exacting scrutiny** commensurate with the powerful federal interest in safeguarding those rights from state encroachment.

Id. (emphasis added). The time for this Court to honor its promise to protect Indian water rights and to hold states to their "solemn obligation" to follow federal law is now. The Apache Tribe respectfully requests that this Court grant the Apache Tribe's Petition.

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7. In doing so, this Court also suggested that Indian tribes consider intervening in the state general stream adjudications in order to protect themselves. *Id.* at 545, 567, n. 17.

A. History of the Gila River Adjudication

The Gila River Adjudication began as an administrative proceeding in 1974, when Respondent, Salt River Project, filed a Petition with the Arizona Land Department to determine conflicting water rights claims in the Salt River above Granite Reef Dam outside of Phoenix. This administrative proceeding evolved into the first of Arizona's two "general" stream adjudications, namely, the Little Colorado Adjudication and the Gila River Adjudication, which are presided over by state superior courts charged under Arizona law with determining the nature, extent and relative priority of the many thousands of competing state and federal claims to Arizona's rivers and streams. *See* A.R.S. § 45–252(a) (App. 287a).

Early during Arizona's attempt to conduct its stream adjudication through administrative procedures in the State Land Department, certain Indian Tribes in Arizona, including the San Carlos Apache Tribe, sought to have their federally protected water rights adjudicated as original actions in **federal** court pursuant to 28 U.S.C. § 1362. Thus, in 1979, the San Carlos Apache Tribe filed an original action in the United States District Court for the District of Arizona, seeking to adjudication its federal reserved, aboriginal and other water rights claims in a **federal** forum. *See, e.g., San Carlos Apache Tribe of Arizona v. State of Arizona, et al.*, CIV 79-186 PHX-PGR. The Tribe's action was stayed by the Ninth Circuit, however, following this Court's decision in *Arizona v. San Carlos*, 463 U.S. at 571.[8] The Tribe's action to adjudicate its federally protected water rights is still pending before the Arizona District Court today, although it is subject to a continuing stay order.

In *Arizona v. San Carlos*, this Court held that Congress waived the sovereign immunity of the United States under the McCarran Amendment, 43 U.S.C. § 666 (App. 286a-287a) for the limited purposes of "comprehensive" state water rights adjudications in the Enabling Act states of Arizona and Montana.

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8. *See San Carlos Apache Tribe of Arizona et al. v. State of Arizona et al.*, 721 F.2d 1187 (9th Cir. 1983).

463 U.S. at 555.[9] Pursuant to the directive of this Court, the United States as trustee for the Apache Tribe, and the Tribe on its own behalf, filed defensible Statements of Claimant in the Gila River Adjudication in 1985, claiming, under oath, federal reserved, aboriginal and other water rights to the Gila River mainstream and its tributaries (Supp. App. 68-102).[10] Since that time, the Apache Tribe has faithfully participated in the Gila River Adjudication, seeking a comprehensive, fair, equal, and timely adjudication of its federally protected water rights *inter sese* with state water rights.

While this Court anticipated in *Arizona v. San Carlos* that the "specialized resources" and "experience" of the state courts would result in an efficient process for the comprehensive adjudication of state and federal water rights, *see* 463 U.S. at 551-553, 569, as explained in greater detail at Section F, *infra.*, the history of the Gila River Adjudication has done little to fulfill these expectations.

B. Proceedings Below

This Petition arises out of two different "contested cases" in the Gila River Adjudication, one involving the water rights claims by and for the Apache Tribe and one involving the water rights claims by and for the Pima Indians of the Gila River Indian Community. Because these cases have been intertwined in the proceedings below, a short procedural history of these cases is set forth here.

By Minute Entry Order dated September 11, 1998 (App. 274a), the Superior Court conducting the Gila River Adjudication directed the filing of motions for summary

9. *See also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 811 (1976); *United States v. District Court for Eagle County*, 401 U.S. 520 (1971).

10. The United States' Statement of Claimant Nos. 39-64257, 39-64258, and 39-64259, filed November 1, 1985, claim more than 209,643 acre-feet of water per year from the Gila River mainstem (Supp. App. 68-102). The Apache Tribe's Statement of Claimant No. 39-63614, filed November 1, 1985, claims more than 643,026 acre-feet of water per year from the Gila River mainstem (Supp. App. 42-67).

judgment by those parties to the Adjudication who "believed" that the 1935 *Globe Equity Decree* may have a "preclusive effect" in the Adjudication on the water rights claims to the Gila River and tributaries made by and for GRIC.[11] This proceeding was designated "Contested Case W1-203." On August 24, 1999, the Superior Court issued a similar Minute Entry Order (App. 282a) directing the filing of motions for summary judgment regarding the "preclusive" effects of the *Globe Equity Decree* for, *inter alia*, the Apache Tribe.[12] This became "Contested Case W1-206."

The Special Master issued a Report and Recommendation in W1-203 containing findings of fact and conclusions of law regarding the preclusive effects of the *Globe Equity Decree* as to GRIC's claims on the Gila River on June 30, 2000 (App. 108a-211a). After objections and argument, the Superior Court entered an Amended Order in Contested Case W1-203 on March 7, 2002 (App. 66a-107a), adopting most of the Special Master's

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11. In the *Globe Equity Decree*, the United States stipulated for the Apache Tribe to water rights for no more than 6,000 acre feet of water from the Gila River mainstream for the irrigation of 1,000 acres of land, which could only be used for the production of "crops of value" (Supp. App. 198 & 224), while the United States secured 2,470,276 acre feet of water rights from the Gila River for its own federal project, the San Carlos Irrigation Project, as follows: (1) 210,000 acre feet with an immemorial priority (Supp. App. 198); (2) 372,000 acre feet with a priority date of 1916 (*Id.*); (3) 603,276 acre feet with priority ranging from very early (*Id.* at 210); and (4) 1,285,000 acre feet of stored water with a priority date of 1924 (*Id.* at 217), plus all groundwater underneath SCIP lands.

12. The Apache Tribe was not a "party" to the *Globe Equity Decree*, therefore opposing claimants asserting the *Decree* as preclusive of the Tribe's federally protected water rights claims in the Gila River Adjudication under *res judicata* have the burden, both on summary judgment and under the standards applicable for *res judicata*, to demonstrate three separate elements: (1) an identity of claims; (2) a final judgment on the merits; and (3) privity between parties. *See Richards v. Jefferson County*, 517 U.S. 793 (1966); *see also Moore's Federal Practice*, § 131.52 (Matthew Bender 3rd ed. 2000).

Report and ruling, *inter alia*, that *res judicata* precluded GRIC, and the United States on behalf of GRIC, from claiming any additional aboriginal, federal reserved, and other water rights to the Gila River mainstream, other than the substantial water rights secured by the United States for GRIC in the *Globe Equity*, and other decrees.

Thereafter, the Superior Court (without substantive discussion) issued a short Minute Entry on May 17, 2002, in Contested Case W1-206 (App.62a-65a), adopting its decision for GRIC in Contested Case W1-203, as the basis for granting summary judgment against the Apache Tribe in Contested Case W1-206, ruling, *inter alia*, that the United States and the Apache Tribe were precluded by the doctrine of *res judicata*, from adjudicating any federal reserved, aboriginal and other water rights claims to the Gila River mainstream, other than the annual irrigation right to 6,000 acre feet of water described in the *Globe Equity Decree*.

On November 19, 2002, the Tribe petitioned the Arizona Supreme Court for Interlocutory Review of six issues arising out of the Superior Court's decision in Contested Case W1-206.[13] The Petition was granted on November 29, 2004.

The Arizona Supreme Court issued the opinion below on February 9, 2006. The opinion summarized the "central issue" of the case as "whether claims advanced by the Tribe (and the United States on the Tribe's behalf) are precluded by a consent decree entered in 1935 by the United States District Court for the District of Arizona." *Gila VI*, 127 P.3d at 884. In answer to this question, the Supreme Court concluded "that the decree precludes the Tribe's claims to additional water from the Gila

13. On September 26, 1989, the Arizona Supreme Court adopted a Special Procedural Order Providing For Interlocutory Appeals and Certifications in the Gila River Adjudication ("Special Procedural Order") (App. 262a-271a). The Arizona Supreme Court has explained: "In a case of this magnitude, which is expected to continue for at least three or four decades, it is imperative that any significant error be corrected immediately to avoid conducting forty years of litigation only to discover the need to begin anew." *See Gila I*, 830 P.2d at 445 n.2.

River mainstream, but not to water from tributaries of the Gila." *Id.*[14] In doing so, the Supreme Court declined to allow the Apache Tribe to prove its **defenses** to *res judicata*,[15] ruling "as a matter of federal law that the doctrine of comity prevents us from considering the Tribe's argument that the [Globe Equity] Decree should not be enforceable against it because of the absence of privity . . . ." *Id.* at 801, n.22.[16] It reasoned that general principals

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14. This Petition focuses on the Supreme Court's decision below which precludes the Apache Tribe and the United States as its trustee from adjudicating its federal reserved, aboriginal and other water rights to **mainstream** of the Gila River. This Petition does not address at this time the Supreme Court's decisions regarding the **tributaries.**

15. The Apache Tribe has **not** sought to upset or invalidate the *Globe Equity Decree* in the Adjudication Court, as is suggested in the opinion below. The Tribe has simply stated, *inter alia*, that the United States, acting in "good faith", could not have intended to adjudicate all of the Apache Tribe's water rights at the time of the *Decree*, or alternatively that there was no "privity" between the United States and the Tribe in *Globe Equity* because the United States failed to adequately represent the Tribe in a myriad of ways, including by (1) failing to investigate, prepare, and prosecute the Tribe's water rights claims with any degree of due diligence or reasonable prudence; (2) including no water for most of the historically irrigated acreage on the Reservation; (3) failing to include any water to drink for the Apaches or their livestock; (4) agreeing to only a mere fraction of the water rights to which the Tribe was entitled under *Winters*, without even including sufficient water for existing needs at the time, or any water for "future" needs; (5) acting under a profound bias in favor GRIC and the non-Indian farmers in SCIDD and the Upper Valleys, while paying only nominal and occasional lip service to the Apaches' rights and claims; and (6) engaging in aggressive self-dealing, and negotiating under an actual conflict of interest, all to the profound detriment of the Tribe.

16. The Arizona Supreme Court failed to examine the *Globe Equity Decree* and its affect on the claims by and for the Apache Tribe based upon the law that existed at the time of the *Decree*, choosing instead to apply current trends regarding the law of *res judicata*. In addition, while the Arizona Supreme Court correctly described the general standards applicable to ordinary consent decrees, noting that such agreements

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of comity "compelled" the Tribe to present its challenge to the preclusive effect of the *Decree* in the federal district court which entered the *Decree*, and that such defenses were not available to the Tribe in the Gila River Adjudication. *Id.* at 897-902.

As a predicate to this ruling, the Arizona Supreme Court re-characterized the Apache Tribe's efforts to present its defenses to *res judicata* as nothing more than a collateral "attack" on the *Globe Equity Decree*, which the Tribe should present in a Rule 60(b) motion in the *Globe Equity* court.[17] By recasting the Apache Tribe's **defenses** to *res judicata* as an attack on the federal *Decree*, the Arizona Supreme Court laid a foundation for its ruling that comity requires the Apache Tribe to present its defenses to opposing claimants' affirmative defense of *res judicata* in the federal district court which retained limited jurisdiction to enforce the *Globe Equity Decree*,[18] instead of in

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"have many of the attributes of ordinary contracts . . .", *Gila VI*, 127 P.3d at 890, n.12, it completely failed to appreciate or consider that standard principles of contract interpretation **do not** have their usual force in cases involving federal Indian law. These flaws permeate the decision below on all levels. The canons of construction applicable in Indian law are rooted in the "unique trust relationship between the United States and the Indians" *County of Oneida v. Oneida Indian Nation of N. Y.*, 470 U.S. 226, 247 (1985); *see also Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886). The canons require that treaties and other agreements purporting to affect Indian Tribes must be liberally construed most strongly in favor of the Indians; ambiguous expressions must be resolved in favor of the Indians; and, are to be construed as the Indians would have understood them. *See Winters*, 207 U.S. at 576-77; *see also Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); Apache Treaty, Article 11 (App. 297a). These liberal cannons of construction favoring Indian Tribes have been specifically applied to interpretations of the *Globe Equity Decree*. *See, e.g., United States v. Gila Valley Irrigation District*, 31 F.3d 1428, 1438 (9th Cir. 1994).

17. *See Gila VI*, 127 P.3d at 901 (original opinion); *see also In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 134 P.3d at 375.

18. *See* Article XIII, Decree (Supp. App. 225).

the state Gila River Adjudication where the affirmative defense of *res judicata* was raised.[19] This ruling calls for immediate review by this Court.

C. Finality of the Decision Below

The decision below constitutes a "final judgment" for purposes of this Court's jurisdiction under 28 U.S.C. § 1257(a). The issuance of a writ of certiorari at this time is both consistent with this Court's promise to review with "particularized and exacting scrutiny" any state-court decision alleged to abridge Indian water rights protected by federal law, *see Arizona v. San Carlos*, 463 U.S. at 561, and in conformance with prior decisions of this Court regarding finality of judgments under 28 U.S.C. § 1257(a).[20]

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court observed that the "requirement of finality is to be

19. The Supreme Court then went further to speculate, without the aid of briefing, a trial on the merits, or oral argument, how it believed the *Globe Equity* court **would have** ruled if the Tribe had attempted to "attack" the *Globe Equity Decree* in the *Globe Equity* court. *See Gila VI*, 127 P.3d at 901. The Supreme Court based its decision on a 1983 ruling of the *Globe Equity* court involving GRIC, where that court ruled that GRIC would not be permitted to intervene in the *Globe Equity* case to "complain of its representation back in 1935" (App. 212a-220a). However, the 1983 ruling (decided under standards for intervention under Fed. R. Civ. P. 24, and not in the context of an inadequate representation defense within the meaning of *Restatement (Second) Judgments*, § 42(1)(e)) relates to another Indian Tribe with a factual situation that is completely different than the Apache Tribe. The Apache Tribe was not a party in the *Globe Equity* case until 1990, whereas GRIC moved to intervene in the case **before** the *Decree* was entered. Its motion was denied in 1935, and GRIC **failed to appeal** that decision. It was this reasoning that guided the *Globe Equity* court's decision in 1983. Nevertheless, the *Globe Equity* court has never ruled as to the preclusive effect of the *Globe Equity Decree* as to the Apache Tribe or as to GRIC. *Id.*

20. In fact, the Arizona Supreme Court anticipated that there would instances in which its interlocutory decisions rendered in the Gila River Adjudication would be immediately reviewable by this Court under *Cox Broadcasting*. *See Gila River I*, 830 P.2d at 445, n.2.

given a practical rather than technical construction", 420 U.S. at 478 (internal citation omitted), and recognized "at least four categories" of cases where the Court will treat state-court judgments as "final" for jurisdictional purposes, despite the fact that further proceedings remain to take place in state court. *Id.* at 477; *see also Flynt v. Ohio*, 451 U.S. 619, 620-21 (1981).

The decision of the Arizona Supreme Court in this case falls squarely within the first and second categories enumerated by *Cox Broadcasting*. The first category of cases are those cases "in which there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox Broadcasting*, 420 U.S. at 479; *see also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 306-307 (1989).

In the decision below, the Arizona Supreme Court expressly precluded the Apache Tribe and the United States as its trustee from **asserting or proving** the Tribe's federal reserved, aboriginal, or other water rights claims to the mainstream of the Gila River in the Gila River Adjudication. This makes the functional result of the Adjudication for the Apache Tribe **no different** today than it will be when, upon the entry of a final decree in the Adjudication, the judgment will become "unquestionably final and appealable" to this Court. *See Mills v. Alabama*, 384 U.S. 214, 217-218 (1966). In the likely never ending "meanwhile", the Tribe will be denied due process and equal protection under the law and will be unable to use the mainstream of the Gila River beyond the nominal right described in the *Globe Equity Decree*.

Thus, the decision of the Arizona Supreme Court is "the final word of a final court." *See Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 81 (1997).[21] This decision is plainly "conclusive" as to the water rights claims by and for the Apache Tribe to the mainstream of the Gila River, and the outcome of

21. Quoting *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945).

any further proceedings in the Adjudication regarding these claims is "preordained." *See Cox Broadcasting*, 420 U.S. at 479; *see also Pierce County v. Guillen*, 537 U.S. 129 142-143 (2003).

For many of the same reasons, the decision below also falls within the second category of *Cox Broadcasting*. The second category involves cases where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480. For cases in this category, nothing could happen in the course of the proceeding below which would moot or otherwise make unnecessary the decision on the federal questions in issue. *Id.*

As noted above, the Apache Tribe's federal water rights claims to the Gila River mainstream have been effectively "adjudicated" by the decision of the Arizona Supreme Court below. Although the future of the State Adjudication process may require the resolution of many different legal questions under both state and federal law, and will entail the eventual adjudication of tens of thousands of competing water rights claims through the Gila River System and Source, nothing may occur in the course of the Adjudication that will "moot" the legal and constitutional claims being raised by the Tribe in this Petition. These federal issue will survive and require eventual review by this Court regardless of the outcome of the Adjudication.

It is also significant, as this Court noted in *Cox Broadcasting*, that of all the considerations surrounding questions of finality, "the most important competing considerations are the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Cox Broadcasting*, 420 U.S. at 478 (internal citations omitted). The balance of these competing considerations weighs heavily in favor of finality in this instance.

On the one hand, the inconvenience and cost of piecemeal review is slight. The issuance of the writ of certiorari to the Arizona Supreme Court requested in this Petition would not

stay or disrupt the Gila River Adjudication process in any substantive way. The Adjudication will continue to move forward, though at its historically glacial pace, just as it has in the past. Questions going to threshold legal issues can continue to be addressed by the Special Master and the Adjudication Court, existing contested cases can proceed without disruption, and the adjudication of other claimants' water rights will not be subject to any additional delay should this Court grant this Petition.

In contrast, a decision to deny this Petition could have serious consequences for the Adjudication process in the long run, if the Apache Tribe is required to await the conclusion of the Gila River Adjudication before it can bring its federal claims to this Court for review. Should this Court ultimately determine that the Arizona Supreme Court's decision regarding the federally protected water rights claims by and for the Apache Tribe was in error, "the entire comprehensive state-court water rights decree [entered in the Gila River Adjudication] may require massive readjustment." *See San Carlos Apache Tribe*, 463 U.S. at 579 (Justice Stevens, dissenting). This, of course, would result in "a completely unnecessary waste of time and energy" for the Adjudication Court and for all of the parties. *See Cox Broadcasting*, 420 U.S. at 478.

On the other hand, "the danger of denying justice by delay" is profound, for it thrusts an unconscionable burden on the Apache Tribe. This Court has held that there exists a "powerful federal interest" in safeguarding federally protected Indian water rights "from state encroachment." *Arizona v. San Carlos*, 463 U.S. at 571.[22] The decision below has effectively "adjudicated" the United States' and Apache Tribe's federal reserved, aboriginal, and other water rights claims to the Gila River mainstream, leaving the Tribe without the right to use a single drop of water from the Gila River mainstream for any other purpose or in any other amount other than for the irrigation of

22. *See also Winters*, 207 U.S. at 565.

1,000 acres of land as described in the *Decree*. The Tribe cannot use the waters of the Gila mainstream as a source of drinking water, for the raising of livestock, the growing of gardens, as a fundamental component of economic development, or to achieve any of those arts and industries of civilization contemplated by this Court in *Winters*.[23]

Yet, as the decision of the Arizona Supreme Court stands today, non-Indian claimants may continue to use water resources in Arizona (both legally and illegally) unfettered by any ruling from the Adjudication Court, pending the entry of a "comprehensive" water rights decree at some point in the distant future (if ever), while the Apache Tribe is prohibited **today** from using any water from the Gila River mainstream for the purposes described above. This makes the danger of delaying justice in this case profound and urgent for the Apache Tribe.

Finally, this Court has already recognized that, given the "virtually unique" nature of water rights adjudications,[24] interlocutory review of federal reserved water rights claims asserted in ongoing state court proceedings can be necessary. On at least two occasions, this Court has issued writs of certiorari to review the interlocutory decisions of state supreme courts regarding the nature or extent of specific federal reserved water rights. *See Wyoming v. United States*, 488 U.S. 1040 (1989), *affirmed without opinion*, 492 U.S. 406 (1989); *United States v. New Mexico*, 438 U.S. 696 (1978). Issues of equal significance and urgency are raised in this Petition. The decision of the Arizona Supreme Court below is "final" for purposes of this Court's jurisdiction under 28 U.S.C. § 1257(a).

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23. *Winters*, 207 U.S. at 565; *see also Gila V*, 35 P.3d at 76.

24. *See Arizona v. San Carlos*, 463 U.S. at 571.

REASONS FOR GRANTING THE PETITION

There are several compelling reasons why this Petition should be granted as contemplated by Rule 10(c) of the Rules of the United States Supreme Court. First, the Arizona Supreme Court has decided an important question of federal law which is in conflict with relevant decisions of this Court, including *Arizona v. San Carlos*, 463 U.S. 545, and *Winters*, 207 U.S. 564. Second, the decision of the Arizona Supreme Court involves important questions of law that have not been, but should be, settled by this Court.

A. The Arizona Supreme Court Has Decided an Important Question of Federal Law in Conflict with Relevant Decisions of this Court, Including *Arizona v. San Carlos* and *Winters*, and Which Defeats the Purpose of the McCarran Amendment

In the decision below, the Arizona Supreme Court refused to allow the Apache Tribe to present its **defenses** to *res judicata*, ruling "as a matter of federal law" that general principles of comity "compelled" the Tribe to present its challenge to the preclusive effect of the *Globe Equity Decree* in the federal district court which entered the *Decree*, and that such defenses were not available to the Tribe in the Gila River Adjudication. *See Arizona v. San Carlos*, 463 U.S. at 897-902. This decision stands on its head this Court's (and the Tribe's) expectations under the McCarran Amendment, *Colorado River*, *Arizona v. San Carlos*, and the Arizona Adjudication. Unless reversed, the decision of the Arizona Supreme Court would send the Tribe back to federal court, and thereby "work the very mischief that [this Court's] decision in *Colorado River* sought to avoid." *Id.* at 855. The Court below developed this novel approach to federal law based upon several significant and material misunderstandings of the history of this case and the claims which the Tribe and the United States made to the Gila River mainstream, as explained below.

1. The History of this Court's Decision in *Arizona v. San Carlos* Demonstrates that the Novel Application of Comity Called for by the Arizona Supreme Court Will Defeat the Purposes of the McCarran Amendment

The Apache Tribe was first introduced to this Court on August 20, 1982, when the Tribe filed its Brief in Opposition to Arizona's May 12, 1982, Petition for Writ of Certiorari, which appealed certain of the rulings of the Ninth Circuit arising out of the Apache Tribe's original action filed in the United States District Court for the District of Arizona pursuant to 28 U.S.C. § 1362. In the original action, the Tribe sought to adjudicate and protect its unique property rights to water from the rivers and streams on its Reservation.

The Apache Tribe's original action, as well as other original actions filed by a number of Arizona Indian Tribes, including the Navajo Nation, (collectively the "Tribes"), arose, in part, out of the Tribes' fear that the enormous non-Indian migration to Arizona, and the alarming unconstrained increase in water use by new residents,[25] would further deplete and exhaust the water supply of Arizona, leaving the Tribes' Reservations without any reliable source of water.[26] Indeed, at the time the

25. The population of Arizona has increased exponentially in the last 80 years. The population has grown from 435,573 persons in 1930, to more than 749,587 people by 1950. *See* Hobbs, Frank and Nicole Stoops, U.S. Census Bureau, Census 2000 Special Reports, Series CENSR-4, *Demographic Trends in the 20th Century*. By 1970, Arizona's population had jumped to almost 1,770,990 people. *Id.* This number has only continued to increase over the last three decades, with population numbers totaling approximately 2,718,215 people in 1980, 3,665,228 people in 1990, 5,130,632 in 2000, and with a total of 5,939,292 (est) people calling Arizona home in 2005. *Id.* The Indian population in Arizona has also grown from 95,812 people in 1970 to 270,662 in 2004. *Id.*

26. As of September 5, 2005, there were approximately 171,910 "registered wells" in Arizona. Many more are not. There were 108,433

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Apache Tribe filed its original action in federal court in 1979, the Tribe was already being denied the use of water from the Gila mainstream on its Reservation.[27]

In seeking to adjudicate their federally protected water rights in federal court, the Tribes argued, among other things, that Arizona lacked *in rem* and *in personam* jurisdiction over the Tribes and their Reservations, and urged that an adjudication of their federally protected water rights would be completed more rapidly, fairly, and competently in federal court, given the federal courts' expertise in federal Indian law and the political disinterest of federal judges, who have lifetime appointments to the federal bench.[28] The Tribes also explained that once a federal court adjudicated the federally protected water rights of the Tribes, these rights could simply be integrated *inter sese* by priority with other rights described in any future decree eventually

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wells registered and installed in the Gila Watershed from 1931 through September 2005. Of these wells, 64,320 were installed since this Court's 1983 decision in *Arizona v. San Carlos*. *See* ADWR Wells 55, Data Base, Version 9-05. The flow of all rivers in Arizona have been substantially reduced as a direct result of this pumping. There are extended periods now, where there is no flow in the Gila River mainstream on the Apache Reservation. Therefore, with the "pigs squeal" "used twice" on the Gila in Arizona in 1955 (App. 322a-326a), non-Indian water use remains largely unchecked, while the Tribe has diligently participated in the State adjudication to protect its "prior and perfected rights."

27. Arizona represented in briefing before this Court even as early as 1931, and most certainly by 1955, that the Gila River was fully consumed within the State before it could reach its confluence with the Colorado River. *See* Opening Brief of the United States in *Arizona v. California* (App. 324a-326a).

28. Given the history of rampant discrimination in Arizona against Indians, the Tribes acutely understood that resolving their federally protected water rights in a state court forum was fraught with peril. *See Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684 (Ariz. 1992), *Goddard v. Babbitt*, 536 F. Supp. 538 (Ariz. 1982).

entered in the State proceedings. Nevertheless, this Court granted Arizona's Petition for Writ of Certiorari on October 4, 1982, in Nos. 81-2147 and 81-2188 Consolidated. A decision in *Arizona v. San Carlos Apache Tribe* was issued on July 1, 1983.

In *Arizona v. San Carlos*, Arizona sought this Court's approval to acquire *in rem* and personal jurisdiction over the Apache Tribe and water rights appurtenant to its land within the Reservation, and over the United States as trustee for the Tribe. Arizona justified these efforts as necessary to obtain a "comprehensive" stream adjudication of **all** those rights to use the waters of the Gila River and its Sources, pointing to the McCarran Amendment, 43 U.S.C. § 666, and this Court's teaching in *Colorado River*, 424 U.S. 800. Arizona also promised that it would apply federal law to those property rights protected by federal law, such as the federal reserved water rights of the United States, and assured this Court that it had the "expertise" and "administrative machinery available [in its] state courts" to manage and adjudicate the tens of thousands of water claims in Arizona in a unified, comprehensive, orderly, and expeditious adjudication. *See Arizona v. San Carlos*, 463 U.S. at 570.

This Court ultimately agreed with Arizona, ruling that the McCarran Amendment waived the sovereign immunity of the United States for the limited purposes of comprehensive stream adjudications, and therefore, Arizona could acquire "**concurrent**" jurisdiction over the United States in this "limited" setting. Although this Court reaffirmed that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them", *see Arizona v. San Carlos*, 463 U.S. at 571, it nevertheless concluded that such "general propositions" could not control in the case, given the fact that a "water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute . . . ." *Id.* Thus, this Court required that the federal courts **defer** to Arizona's general stream adjudication for the

adjudication of the Tribes' federally protected water rights, concluding that any other decision would be:

> [I]nconsistent with the McCarran Amendment's policy of recognizing the availability of comprehensive state systems for adjudication of water rights as the means for conducting unified water proceedings, likely to generate additional litigation as a result of inconsistent dispositions of property, and permeated with state-law issues entirely tangential to any conceivable federal interest.[29]

Also paramount in the Court's reasoning, was its strong concern that concurrent federal proceedings would almost certainly result in "piecemeal litigation" which was likely to be:

> [D]uplicative and wasteful, generating 'additional litigation through permitting inconsistent dispositions of property' and that since a judgment by either court would ordinarily be res judicata in the other, the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the same issue first – a race contrary to the entire spirit of the McCarran Amendment and prejudicial, to say the least, to the possibility of reasoned decisionmaking by either forum.[30]

Such a result, this Court opined, was the "very mischief that our decision in *Colorado River* sought to avoid." *Id.* at 564.

Finally, this Court admonished that "state courts, as much as federal courts, have a solemn obligation to follow federal law . . . [and] any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought before this Court, a particularized and exacting scrutiny

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29. *Id.* at 566 (quoting *Colorado River*, 424 U.S. at 819-820) (internal quotation marks and brackets omitted).

30. *Id.* at 567 (quoting *Colorado River*, 424 U.S. at 819) (internal citations omitted).

commensurate with the powerful federal interest in safeguarding those rights from state encroachment." *Id* at 571.

Twenty three years after this Court's decision in *Arizona v. San Carlos*, the Apache Tribe is before the Court to request its protection from the decision of the Arizona Supreme Court below which, if allowed to stand, will unravel the very purpose and reasoning behind this Court's decision in *Arizona v. San Carlos*.

2. The Arizona Supreme Court's Application of General Principles of Comity In This McCarran Amendment Proceeding Is the Antithesis of this Court's Rationale in *Arizona v. San Carlos*

The Arizona Supreme Court's reliance on general principles of comity to require the Apache Tribe to present its defense to the application of *res judicata* in the federal court which has continuing enforcement jurisdiction over the *Globe Equity Decree*, instead of in the state Adjudication where the affirmative defense of *res judicata* was raised, is irreconcilable with the rationale expressed by this Court in *Arizona v. San Carlos*. Indeed, since this Court has determined that the policies of the McCarran Amendment and concerns over "piecemeal litigation" should be elevated above the general, but strong, proposition that federal courts have a "virtually unflagging obligation" to exercise the jurisdiction given them, *see id.* at 569-571, this Court most certainly should not countenance the use of general principles of "comity", as expressed by the Arizona Supreme Court in the decision below, to trump today the very same policies or create the same concerns this Court sought to avoid in 1983 in *Arizona v. San Carlos*.

There are dozens of matters involving streams in Arizona and throughout the west where the United States may have appeared at some time in the past, whether as trustee for an Indian Tribe or in some other capacity. The danger of state courts applying comity in these situations is very real, for such an application will undoubtedly send countless parties back to the court in which the United States originally appeared to resolve

any outstanding issues regarding such representation. This is especially true for Indian Tribes throughout the west, who almost always are alleged (whether rightly or wrongly) to have been "represented" by the United States in many different proceedings involving their federally protected water rights.

If the Arizona Supreme Court's decision on comity is allowed to stand, it would leave opposing claimants free to argue (without challenge) and in violation of Constitutional protections of due process, that if the United States appeared at all, it was required to bring all claims that it could have brought at the time, and if it did not, tough luck, **regardless** of the intent or the quality of representation by the United States. Such a result would eviscerate the policy of comprehensive and unified proceedings anticipated by Congress in the passage of the McCarran Amendment.

This Court directed the Tribe towards the Arizona's stream adjudication by holding that the United States **must** file its claims on behalf of the Apache Tribe in Arizona's state Adjudication Court. Having asked for and received these claims, the Adjudication Court **should** be required to resolve all questions necessary for the adjudication of these claims, as well as any possible affirmative defenses presented in response to such claims, like *res judicata*, and it may not simply ignore any corresponding **defenses** raised in response to such affirmative defenses, including the Tribe's challenge to privity.

Finally, and perhaps more fundamentally, to employ the "tool" of comity to prevent the Tribe from proving its rights to the mainstream of the Gila River defeats the very purpose behind the Apache Reservation, because, without the waters of the Gila River mainstream, the Tribe will be unable to support itself in its "permanent tribal homeland" as anticipated by this Court in *Winters*. As the Court was reminded by the dissent in *Arizona v. San Carlos*, "[t]his court has repeatedly recognized that the Government, when it created each Indian reservation, intended to deal fairly with the Indians by reserving for them the waters

without which their lands would have been useless." 463 U.S. at 573 (internal quotations omitted).

B. The Question of Whether Comity May Be Used to Bar An Indian Tribe From Presenting a Defense to *Res Judicata* in a State General Stream Adjudication Is an Important Question of Law of Constitutional Magnitude Which Should be Decided by This Court

The decision below prohibited the Apache Tribe from proving its defenses to *res judicata* in the General Adjudication. *See Gila VI*, 127 P.3d at 898. As a result, the Tribe has never been given the opportunity at any level of the Gila River Adjudication, whether before the Special Master, in the Superior Court, or in the Arizona Supreme Court, to argue that the affirmative defense of *res judicata* cannot bar the Tribe's claims to the mainstream of the Gila River, because there was no "privity" between the United States and the Tribe in *Globe Equity* under any principle of equity, or within the meaning of *Restatement (Second) Judgments*, § 42(1)(e) (App. 121a).[31]

The Apache Tribe has not uncovered a single case in which this Court has ruled that the defense of inadequate representation is **unavailable** as a matter of law in cases involving Indian water rights claims presented in state general stream adjudications.[32]

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31. The defense of inadequate representation as set forth in § 42(1)(e), provides, in relevant part:

> A person is not bound by a judgment for or against a party who purports to represent him if: [ ]The representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent. (Emphasis added).

32 This Court also did not consider or rule against the viability of the legal defense of inadequate representation in *Nevada v. United States*, 463 U.S. 110 (1983), which is a case often cited for principles of *res judicata* in matters involving federally protected Indian water rights. While the defense of inadequate representation was raised in a 43-day

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The contrary, this Court assumed the **viability** of the inadequate representation defense in *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"), when it analyzed the argument made by a number of Indian Tribes on the Colorado River that the United States had inadequately represented the Colorado River Tribes when it secured over 782,000 acre feet of water rights to the Colorado River for the Tribes in the *Arizona v. California Decree*. *See* 460 U.S. at 627-28.

Although this Court ultimately determined, as a **factual matter**, that the Colorado River Tribes had failed to demonstrate inadequate representation, the Court nevertheless acknowledged the defense of inadequate representation as viable under the law, and examined each of the legal elements of this defense in light of the factual record below. *Id.*[33]

The new "rule" of law established by the Arizona Supreme Court in the decision below, however, elevates general principles of comity above the Constitutional protections of due process and equal protection guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution (App. 284a-285a), and breaks Arizona's promise that "Indian interests [can] be satisfactorily protected under regimes of state law . . . ." in Arizona's stream adjudication. *See Arizona v. San Carlos*, 463 U.S. at 551 (quoting *Colorado River*, 424 U.S. at 812-813).

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trial before the trial court and was argued and rejected as a **factual matter** on appeal to the Ninth Circuit, *see United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286, 1295 (9th Cir. 1981), *modified at* 666 F.2d 351 (9th Cir. 1982), the viability of the legal defense of inadequate representation was **not** one of the issues raised on appeal and considered by this Court in *Nevada*.

33. Following an examination of the facts in the record, the Court found that the United States had obtained "substantial water allocations" on the Colorado River for the Tribes in the *Arizona v. California Decree*, and that this demonstrated the "competency of the United States' representation . . ." of the Tribes. *Arizona II*, 460 U.S. at 628 &.628 n.20.

In *Hansberry v. Lee*, 311 U.S. 32, 37 (1940), this Court ruled that it violates the Due Process Clauses of the Fifth and Fourteenth Amendment to the U.S. Constitution to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not **adequately** represented. This holding has been reiterated in subsequent rulings by this Court. *See, e.g., Richards v. Jefferson County*, 517 U.S. 793 (1996). In addition, in *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 475-476 (1918), a decision which precedes *Hansberry v. Lee* by several decades, this Court warned that "extreme applications of *res judicata* may be inconsistent with a federal right that is 'fundamental in character'", explaining that:

> The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.

Newport, 247 U.S. at 476 (internal citations omitted). Discussing the requirement of privity in *Jefferson County*, this Court observed "[t]his rule is part of our 'deep-rooted historic tradition that **everyone should have his own day in court**.'" 517 U.S. at 799 (emphasis added) (quoting 18 C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* § 4449, p417 (1981)).

The Apache Tribe has never had its "own day in court", whether to adjudicate its federal reserved, aboriginal, and other

water rights claims to the Gila River mainstream, or to present its defenses to *res judicata* in a trial on the merits. The ruling below, therefore, compounds the initial violation of due process visited on the Tribe through the inadequate representation of the Tribe by the United States in *Globe Equity*, with a new violation of due process, stemming from the ruling below, wherein the Arizona Supreme Court refused to allow the Apache Tribe to prove its defenses to *res judicata* in the Gila River Adjudication, despite the fact that it was in this proceeding that the affirmative defense was raised by the Tribe's opponents.

The Apache People are also entitled to equal protection under the law. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976). The Apache Reservation is comprised of almost 2 million acres. While the Reservation is arid and hot, and often devoid of any meaningful rainfall, over these lands flow the waters of the Gila River; and while the Gila River is beyond a doubt the single most important source of water on the Reservation, the Apaches are prohibited by the decision below from even taking a drink from the Gila River mainstream as it flows on their Reservation. Instead, for approximately 1,500,000 acres in the Gila River drainage, the Tribe is entitled to use water for no more than 1,000 acres of land, because (according to the decision below), this is the water right described for the Tribe in the *Globe Equity Decree*.

Non-Indian farmers, local towns, mining companies and businesses, among other non-Indian interests are **not** bound by the same restrictions. While these non-Indians have lands on the Gila River for which **specific water** rights are described in the *Globe Equity Decree*, just like the Apache Tribe, and while many of these non-Indians **also** own additional lands on Gila River which **do not** have water rights described in the *Decree*, the non-Indians **are** permitted to claim in the Adjudication (and continue to divert and use) as much of the waters of the Gila River mainstream for these additional non-Decreed lands as they think they can "beneficially use" under Arizona law. The Apache Tribe is not.

Such unequal treatment under the law in Arizona's stream adjudication violates equal protection which is guaranteed to all persons under the U.S. Constitution.[34]

C. Arizona Has Broken its Promise to this Court, the United States, and the Tribes, that Indian Water Rights in Arizona Will Be Adjudicated in a Fair and Comprehensive Manner

Since this Court's decision in *Arizona v. San Carlos* in 1983, the State has done little to fulfill its promise of conducting a fair, expeditious, and comprehensive general adjudication of Indian water rights in Arizona. The hard fact is that not a single non-Indian water right has been adjudicated over the last 23 years.

At the outset of the Adjudication, however, the future of the Adjudication seemed not without hope. The non-Indian rights were joined with the rights of the Apache Tribe and those of the United States in the same sub-watershed for *inter sese* adjudication, and the Tribe participated actively and successfully in cases before the Special Master, the Superior Court, and the Arizona Supreme Court to establish the fundamental rules and law by which the adjudication would proceed.[35]

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34. As explained at Section F, *infra.*, Arizona has failed to fulfill its promises of conducting a "comprehensive" general stream adjudication in which the rights of **all** claimants, Indian or non-Indian, are adjudicated *inter sese*. Instead, Arizona has chosen to single out only Indian rights for adjudication. This too violates equal protection. Moreover, the Tribe's unequal treatment in the Adjudication should be reviewed under standards of "strict scrutiny" given the Apaches' position as a "suspect class" under the law.

35. *See, e.g., Gila III*, 989 P.2d 739 (holding that the federal reserved water rights doctrine applies to groundwater as well as appropriable surface water, and that groundwater necessary to satisfy these federal reserved water rights is entitled to greater protection than state based rights); *Gila V*, 35 P.3d 68 (holding that federal reserved water rights encompass all water necessary to preserve Indian tribes in

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The Hydrographic Survey Report ("HSR") for the San Pedro River was published on November 11, 1991. The HSR contained a Watershed File Report for each federal and state claim in the San Pedro sub-watershed. Objections to any claim required specific reference to the applicable state or federal laws, and required verification by the attorney for the party filing the objection.

On May 4, 1993, the Tribe, along with several other parties, filed several hundred objections to the claims presented. In order to resolve these objections, the Court established several contested cases with discovery and trial dates. The Tribe participated and substantially prevailed in these cases.

One contested case, W1-11-1676, was set for trial on April 4, 1995. Unknown to the Tribes and the United States, however, the state parties, including ADWR, drafted legislation to reverse previous decisions of the Adjudication Court favorable to the Tribe, as well as to "cure" the defects to the non-Indian claims illuminated in by the Objections filed in the San Pedro HSR, and to legislatively "adjudicate" substantially **all** of the non-Indian rights. On March 17, 1995, the Legislature passed H.B. 2276 and it was immediately signed by the Governor under an emergency clause which made it effective in 30 days. Shortly thereafter, the Adjudication Court stayed the trial in W1-11-1176, because it appeared from the "new law" that the Legislature had resolved the objections by simply changing all the laws upon which they were based.

On April 14, 1995, the Apache Tribes filed a Petition for Special Action with the Arizona Supreme Court requesting that it stay the implementation of H.B. 2276 and declare its provisions unconstitutional. The Arizona Supreme Court accepted the Tribes' Petition, but in May 1995, in what can only

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their permanent tribal homelands both now and in the future, and that in order to quantify such rights the adjudication court should examine a myriad of factors and not just the extent of practically irrigable acreage or "PIA" found on the reservations).

be described as a punitive reaction to the Tribes' previous and valid objections to non-Indian claims, the Arizona Legislature singled out federal and Indian claims for early adjudication, declaring that "'an early focus by the general stream adjudication courts'" should be "'the trial of Indian and non-Indian federal water claims.'" *See Gila VI*, 127 P.3d at 886 (quoting 1995 Ariz. Sess. Laws, Ch. 9, § 25(c)). In the meantime, while the Tribe's Special Action challenging HB 2276 was pending before the Arizona Supreme Court, the State Legislature in 1995 drastically cut funding for any efforts by ADWR involving the adjudication of non-Indian claims, and today the funding for Arizona's stream adjudication has dwindled to less than a trickle.[36]

On January 23, 1999, the Arizona Supreme Court struck down substantially all of H.B. 2276 on various constitutional grounds. *See San Carlos Apache Tribe, et al., v. Superior Court of Arizona*, 972 P.2d 179 (1999)

On August 24, 1999, the Adjudication Court (App. 282a) invited opposing water rights claimants to file motions for

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36. *See* May 19, 2006, *Report of the Special Master In the Little Colorado Adjudication Concerning Funding of the Arizona Department of Water Resources* (Supp. App. 37); *see also Arizona Department of Water Resources Status Report in the Gila River Adjudication*, dated January 13, 2006, stating in part:

> Since ADWR began working on the adjudications in the 1980s, ADWR's budget has been severely reduced. **In the mid-1990s, while legal issues were being addressed in each of the adjudications, ADWR's staffing level was reduced substantially.** When proceedings resumed, ADWR was experiencing department-wide budget constraints, some which were the result of significant shortfalls in state revenues 8 * * * The overall lack of revenues through fiscal year 2006 affected the level of resources available for ADWR for the technical and administrative support to the Gila And LCR adjudications. Although state revenues have begun to recover . . . **ADWR has not been able to obtain additional adjudication resources, and at this time appears to have lost overall resources for FY07**. (Supp. App. 20) (emphasis added).

summary judgment challenging the water rights claims made, *inter alia*, by and for the Apache Tribe, citing the purported "preclusive" effect of the federal *Globe Equity Decree*. With no risk to their own claims, which had been on hold for four years, the non-Indian parties eagerly accepted the Court's invitation, raising the affirmative defense of *res judicata* and urging the Adjudication Court to refuse to hear any evidence of the Tribe's claims for water originating on and flowing through the Reservation in the mainstream of the Gila River and its tributaries. They also urged the Court to refuse to hear any defenses of the Tribe to *res judicata*. The rulings of the Adjudication Court on this issues are what eventually gave rise to the Petition currently before this Court.

The Arizona's stream adjudication has simply come to this. Arizona has ceased to fund the "expertise and administrative machinery available to the state courts" necessary to adjudicate any non-Indian water rights claim. *See Arizona v. San Carlos*, 463 U.S. at 570. Arizona cannot use the McCarran Amendment and the facade of "comprehensive" general adjudication as a ruse to adjudicate only the Indian rights. This would be the very antithesis of this Court's rulings.

CONCLUSION

For the foregoing reasons, the San Carlos Apache Tribe respectfully requests that this Court grant its Petition and issue a writ of certiorari as to Issue 1 and Issue 2 to the Arizona Supreme Court on the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF ARIZONA FILED FEBRUARY 9, 2006

SUPREME COURT OF ARIZONA

No. WC-02-0003-IR

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE.

February 9, 2006

OPINION

HURWITZ, Justice.

This is an interlocutory appeal by the San Carlos Apache Tribe ("Apache Tribe" or "Tribe") from an order issued in the Gila River general stream adjudication. *See* Ariz.Rev.Stat. ("A.R.S.") §§ 45-251 to -264 (2003) (authorizing general stream adjudications). The central issue is whether claims advanced by the Tribe (and the United States on the Tribe's behalf) are precluded by a consent decree entered in 1935 by the United States District Court for the District of Arizona. We conclude that the decree precludes the Tribe's claims to additional water from the Gila River mainstem, but not to water from tributaries of the Gila.

Appendix A

I.

A.

The San Carlos Apache Reservation was established in 1872. The Gila River Indian Community ("GRIC") Reservation was established in 1859. Each reservation borders the Gila River.[1]

In the late 1800s, the federal government began considering a storage dam on the Gila River to provide water to the Tribe, GRIC, and non-Indian landowners in the Florence-Casa Grande area. In 1924, Congress first appropriated funds for the San Carlos Irrigation Project ("San Carlos Project"), a reclamation project involving construction of the Coolidge Dam on the Gila River and the creation of the San Carlos Reservoir. To facilitate the development of the San Carlos Project, the United States entered into agreements in 1924 with landowners along the Gila River (the "Landowners' Agreements"). Under these agreements, the landowners conveyed water rights appurtenant to their lands to the United States in exchange for San Carlos Project waters.

In 1925, the United States filed a complaint (the "Complaint") in the United States District Court for the

1. "The Gila River originates in Western New Mexico and flows in a general westerly direction across Arizona to its confluence with the Colorado River." *United States v. Gila Valley Irrigation Dist.*, 454 F.2d 219, 220 (9th Cir.1972). "The land through which the stream flows is semi-arid or desert land requiring irrigation for successful agricultural or horticultural results." *Gila Valley Irrigation Dist. v. United States*, 118 F.2d 507, 508 (9th Cir.1941).

District of Arizona on behalf of itself, the Tribe, GRIC, and landowners within both the San Carlos Project and the Florence-Casa Grande Project (an earlier reclamation project on the Gila River). The Complaint named as defendants numerous individuals, irrigation districts, canal companies, and corporations. The Complaint alleged that GRIC, the Apache Tribe, and the reclamation projects were entitled to certain quantities of water from the Gila River and its tributaries and that the defendants' claims were "in conflict with or adverse to" the rights of the tribes and the projects. Compl. ¶ 7. The Complaint sought a determination of the rights of the parties "to the use of the waters flowing in said Gila River and its said tributaries." *Id.* ¶ 8.

Two years later, the United States filed an amended complaint (the "Amended Complaint"). The Amended Complaint denominated all parties other than the tribes and the United States as defendants, but explained that landowners "who have by contracts devoted their water rights to the said Florence-Casa Grande Project, and the San Carlos Project . . . are interested on the side of the United States in this action." Am. Compl. ¶ 15. In contrast to the initial Complaint, which sought an adjudication of rights to the "waters from said Gila River and its tributaries," Compl. ¶ 8, the Amended Complaint sought only to adjudicate the parties' rights to the "waters of the Gila River." Am. Compl. ¶¶ 14, 15.

Litigation continued over the next eight years. In 1935, the United States entered into stipulations dismissing without prejudice all defendants who maintained claims only to waters of the Gila River tributaries. The remaining parties

stipulated to the entry of the Globe Equity Decree (the "Decree"). The Decree states that the parties "have concluded and settled all issues in this cause" and that the Decree "embodie[s] . . . and confirm[s]" the settlement of the parties. The Decree then "defin[es] and adjudicat[es] the [ ] claims and rights" of the parties by listing the dates of priority and amounts of water to which each is entitled. The Decree also specifies the places at which the parties may divert water.

The Decree is administered by a Water Commissioner appointed by the district court. The district court has retained jurisdiction to enforce and interpret the Decree. Litigation interpreting the Decree began soon after its entry and has continued ever since.[2]

B.

Arizona law provides for the determination of multiple water use claims through general stream adjudications. *See* A.R.S. §§ 45-251 to -264. The Gila River general stream adjudication began in 1981 when we ordered a series of petitions consolidated into a single proceeding. *See In the Matter of the Rights to the Use of the Gila River* ("*Gila I* "), 171 Ariz. 230, 232-33, 830 P.2d 442, 444-45 (1992).[3] In 1995,

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2. The first Ninth Circuit decision involving the Decree was *Gila Valley Irrigation District v. United States*, 118 F.2d 507 (9th Cir.1941), and the most recent was *United States v. Gila Valley Irrigation District*, 117 F.3d 425 (9th Cir.1997).

3. The history of the Gila River general stream adjudication is documented in previous decisions of this and other courts. (Cont'd)

the Legislature declared that "an early focus by the general stream adjudication courts" should be "the trial of Indian and non-Indian federal water claims." 1995 Ariz. Sess. Laws, ch. 9, § 25(C). The superior court accordingly directed interested parties to file summary judgment motions as to whether claims raised by or on behalf of the Tribe in the general stream adjudication were precluded by the Decree.

In 2001, GRIC, ASARCO LLC, Phelps Dodge Corporation, the City of Safford ("Safford"), the Gila Valley Irrigation District ("GVID"), the Franklin Irrigation District ("FID"), and the San Carlos Irrigation and Drainage District ("SCIDD") filed summary judgment motions. These motions argued that the Decree precludes the Tribe, and the Government on its behalf, from asserting additional claims to water from the Gila River and its tributaries. Some motions also contended that under the Supreme Court's opinion in *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983), non-parties to the Decree could assert the claimed preclusive effect of the Decree.

(Cont'd)

See Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 557-59, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983) (subsection entitled "The Arizona Cases"); *Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 201 Ariz. 307, 309-10 ¶¶ 1-2, 35 P.3d 68, 70-71 (2001); *Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 198 Ariz. 330, 333-34 ¶¶ 1-2, 9 P.3d 1069, 1072-73 (2000); *Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 195 Ariz. 411, 413-14 ¶¶ 1-5, 989 P.2d 739, 741-42 (1999); *Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 175 Ariz. 382, 384-85, 857 P.2d 1236, 1238-39 (1993); *Gila I*, 171 Ariz. at 232-33, 830 P.2d at 444-45; *United States v. Superior Court*, 144 Ariz. 265, 270-71, 697 P.2d 658, 663-64 (1985) (subsection entitled "The Controversy").

The Tribe also filed a summary judgment motion, arguing that the Decree does not preclude its claims to additional water from the Gila River or the San Carlos River, a tributary of the Gila. The Tribe also argued that the Landowners' Agreements preclude GRIC from asserting claims to the San Carlos River.

On May 17, 2002, the superior court granted partial summary judgment to ASARCO, Phelps Dodge, Safford, SCIDD, GVID, and FID. The court held that the Decree was limited to the Gila River mainstem and did not cover its tributaries. The superior court also held that non-parties to the Decree could assert its preclusive effect.[4]

Given the lengthy nature of general stream adjudications, we have provided for interlocutory review of certain superior court orders. Special Procedural Order Providing for Interlocutory Appeals and Certifications (September 26, 1989); *see Gila I*, 171 Ariz. at 233 n. 2, 830 P.2d at 445 n. 2 (discussing the Special Procedural Order). We granted interlocutory review of six issues raised by the Apache Tribe and one issue raised by Phelps Dodge. Each of these issues turns on the preclusive effect of the Decree.[5]

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4. On March 7, 2002, the superior court had entered an order holding that "neither GRIC nor the United States on behalf of GRIC shall be entitled to claim water rights relating to the mainstem of the Gila River . . . except to the extent that such rights were granted to them by the *Globe Equity Decree*." The superior court's May 17, 2002 order, which is the subject of this appeal, refers to and incorporates by reference this previous order.

5. The six issues raised by the Tribe are as follows:

(1) "Where the San Carlos Apache Reservation was established pursuant to the Apache Treaty of 1852 as a

(Cont'd)

Appendix A

(Cont'd)

Permanent Tribal Homeland of nearly 2 million acres, with nearly 1,500,000 acres on the Gila River, did the Superior Court err when it denied the Apache Tribe a trial on the merits of its claims by granting a motion for partial summary judgment holding that the doctrine of res judicata preclude[s] the Tribe from claiming water for its Tribal homeland in excess of the United States['] right to water for 1,000 acres under the Globe Equity Decree?" (2) "Did the Superior Court err in ruling that [the] statement of facts in its Amended Order in W1-203 involving GRIC also applies to the Apache Tribe in W1-206?" (3) "Did the Trial Court err when it denied the Apache Tribe's request for an evidentiary hearing on the adequacy of the representation of the United States as its Trustee under § 42(1)(e) of the *Restatement (Second) of Judgments* [,] and ruled that res judicata applies to the Apache Tribe under [the] Decree?" (4) "Did the Superior Court err where it failed to conclude that the United States lacked any authority from Congress to represent the Apache Tribe in Globe Equity or to dispose of Tribal property which would preclude the application of res judicata; or alternatively, where it failed to conclude that the issue of lack of authority is a disputed genuine issue[ ] of material fact?" (5) "Did the Superior Court err in failing to determine that the Landowners' Agreement of 1924 or the Decree, specifically preclude GRIC, and the United States on behalf of GRIC, from claiming any water rights to the San Carlos River in the Gila River stream adjudication?" (6) "Did the Superior Court err when it ruled that the 'mutuality exception' under *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983), does not apply to bar any claims that the parties to the Decree may have to any of the tributaries of the Gila River in the Gila River stream adjudication?"

(Cont'd)

Appendix A

This Court has jurisdiction over this interlocutory appeal pursuant to Article 6, Section 5(3) of the Arizona Constitution and the Special Procedural Order.[6] We review grants of summary judgment de novo. *See Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 308 ¶ 2, 70 P.3d 435, 437 (2003).[7]

(Cont'd)

Phelps Dodge raised the following issue:

> "Did the Superior Court err when it found that the claims of the parties in the *Globe Equity 59* proceedings to waters of the Gila River's tributaries had been 'split' from those same parties' claims to the main stem waters of the Gila River, and therefore that such tributary claims had not been part of the GE 59 Decree and were not affected by the same preclusive, *res judicata* effects that the GE 59 Decree had on the parties' claims to the river's main stem?"

6. Our Special Procedural Order "is the exclusive remedy for the presentation of interlocutory issues to this court in this adjudication" and was issued pursuant to Article 6, Section 5 of the Arizona Constitution, A.R.S. § 45-259 and § 12-2101 (2003), and Rule 19(a)(3) and (f) of the Arizona Rules of Civil Appellate Procedure. Gila I, 171 Ariz. at 233 n. 2, 830 P.2d at 445 n. 2.

7. After granting review, we entered an order permitting "[a]ny party that properly filed a notice of appearance in this matter" to submit a brief. Pursuant to that order, the United States, the Apache Tribe, GRIC, Phelps Dodge, ASARCO, SCIDD, Safford, GVID, FID, and Salt River Project ("SRP") filed briefs.

II.

Federal law dictates the preclusive effect of a federal judgment. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001) (noting that state courts cannot give federal judgments "merely whatever effect they would give their own judgments, but must accord them the effect that [the United States Supreme] Court prescribes"); *Heck v. Humphrey*, 512 U.S. 477, 488 n. 9, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) ("State courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions on issues of federal law."); *First Pac. Bancorp v. Helfer*, 224 F.3d 1117, 1128 (9th Cir.2000) ("When considering the preclusive effect of a federal court judgment, we apply the federal law of claim preclusion."); Restatement (Second) of Judgments ("Second Restatement") § 87 (1982) ("Federal law determines the effects under the rules of res judicata of a judgment of a federal court."). Thus, our task is to give the Decree the same preclusive effect as the federal courts would give it.

We deal today with the issue of claim preclusion, formerly referred to as res judicata.

> Simply put, the doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case, 'it is a finality as to the claim or demand in controversy, concluding parties and those in privity with them . . . as to every matter which was offered and received to sustain or defeat the claim or demand. . . .'

Nevada, 463 U.S. at 129-30, 103 S.Ct. 2906 (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195 (1876)) (internal alteration omitted); *see also Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d *210 (1979)* ("Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action."). The defense of claim preclusion has three elements: (1) an identity of claims in the suit in which a judgment was entered and the current litigation, (2) a final judgment on the merits in the *888 previous litigation, and (3) identity or privity between parties in the two suits. *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 323-24, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971).[8]

The parties agree that the Decree is a final judgment and satisfies the second element of claim preclusion. The parties differ sharply, however, as to whether the other two elements of claim preclusion-an identity of claims and privity-are present in this case. We address these issues in turn below.

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8. Only claim preclusion is at issue in this case. " '[C]onsent judgments ordinarily support claim preclusion but not issue preclusion.' " *Arizona v. California*, 530 U.S. 392, 414, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000) (quoting 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4443 (1981)). This is because issue preclusion (formerly referred to as collateral estoppel) "attaches only when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment. In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated." *Id.* (internal alterations and citations omitted).

III.

The parties advance very different positions as to what claims were asserted in the Globe Equity litigation and adjudicated by the Decree. The Tribe argues that the United States (as trustee) asserted only a theory of prior appropriation. The Tribe contends that the Decree therefore does not address the Tribe's "aboriginal" water rights or *Winters* reserved water rights.[9] The Tribe also argues that the Decree did not involve claims to the tributaries of the Gila River, particularly the San Carlos River. The United States agrees with the Tribe with respect to claims to tributaries of the Gila River, but does not expressly contest that the Decree covered all claims to water from the Gila River mainstem. GRIC takes no position as to whether the various parties' motions for summary judgment should have been granted, but argues that the Globe Equity litigation sought to quantify water rights for only the Gila River mainstem.

In contrast, Phelps Dodge, SCIDD, Safford, GVID and FID argue that the Decree resolved all of the Tribe's claims to water both in the Gila River mainstem and its tributaries. SRP argues that the Decree precludes the Tribe from asserting additional claims to the Gila River mainstem, but takes no position with respect to the tributaries. ASARCO contends

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9. As the Supreme Court has noted, its decision in *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), established that when the federal government creates an Indian reservation, it "impliedly reserve[s] a right to the amount of . . . water necessary to effectuate the purposes" of the reservation. *Nevada*, 463 U.S. at 116 n. 1, 103 S.Ct. 2906.

that the Apache Tribe and the United States are precluded only from asserting claims for additional water from the Gila River and the San Carlos River, but that they may assert claims to waters from other Gila River tributaries; ASARCO also argues that the Decree awarded waters of the San Carlos River to ASARCO through its predecessor, Kennecott Copper Corporation ("Kennecott").

A.

The Supreme Court of the United States has never precisely defined the test for determining if there is an identity of claims in two actions for purposes of claim preclusion. Before the adoption of the Federal Rules of Civil Procedure in 1938, federal case law focused on the "causes of action" asserted in the two suits. *See, e.g., United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67-68, 53 S.Ct. 278, 77 L.Ed. 619 (1933) ("A 'cause of action' may mean one thing for one purpose and something different for another."); *see also* O.L. McCaskill, *Actions and Causes of Action*, 34 Yale L.J. 614, 614 (1925) ("The cause of action has not been understood. Eminent writers . . . have failed to agree as to its character and scope."). In those days, "the courts were prone to associate claim with a single theory of recovery, so that, with respect to one transaction, a plaintiff might have as many claims as there were theories of the substantive law upon which he could seek relief against the defendant." Second Restatement § 24 cmt. a.

Under this approach, the federal courts developed a number of tests for determining whether two causes of action were the same for purposes of claim preclusion. One test

focused on the "primary right" of the plaintiff that allegedly had been infringed. *See, e.g., Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321, 47 S.Ct. 600, 71 L.Ed. 1069 (1927) ("A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show."). Another test focused on whether the same evidence considered in the first suit would sustain the second. *See* Restatement of Judgments ("First Restatement") § 61 (1942) ("[T]he plaintiff is precluded from subsequently maintaining a second action based upon the same transaction, if the evidence needed to sustain the second action would have sustained the first action."); *see also* John F. Wagner, Jr., Annotation, *Proper Test to Determine Identity of Claims for Purposes of Claim Preclusion by Res Judicata Under Federal Law*, 82 A.L.R. Fed. 829, 1987 WL 419509 (1987) (collecting case law establishing different tests).

After the adoption of the Federal Rules of Civil Procedure in 1938, the "tests for determining the identity of a claim or cause of action . . . developed concomitantly with the evolution of modern civil procedure." Wagner, *supra*, at 836; *see also Nevada*, 463 U.S. at 130, 103 S.Ct. 2906 (noting that "[d]efinitions of what constitutes the 'same cause of action' have not remained static over time," and citing the changes between the First and Second Restatements of Judgments). "With the adoption of the Federal Rules of Civil Procedure and the unified form of action . . . much of the controversy over 'cause of action' abated." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Thereafter, the test for determining the identity of claims focused on the "transaction" or "natural grouping or common nucleus of operative facts" making up

the plaintiff's claims. Second Restatement § 24 cmt. b; *see also Williamson v. Columbia Gas & Elec. Corp.*, 186 F.2d 464, 470 (3d Cir.1950) (noting that the "modern systems of pleading, especially the federal system, as exemplified by the free permissive joinder of claims, liberal amendment provisions, and compulsory counterclaims" altered the definition of "claim" for purposes of claim preclusion).

"Seven of the thirteen federal circuit courts, as well as the Claims Court have thus far expressly adopted the [Second] Restatement's transactional approach" to defining a claim for purposes of claim preclusion. Wagner, *supra*, at 837. While the Supreme Court has not explicitly adopted the Second Restatement's transactional approach, it has applied a transactional analysis in several different contexts in which the definition of "claim" was legally significant. *See, e.g., United Mine Workers*, 383 U.S. at 725, 86 S.Ct. 1130 (holding that for purposes of pendent jurisdiction the "state and federal claims must derive from a common nucleus of operative fact"); *Reeves v. Beardall*, 316 U.S. 283, 286, 62 S.Ct. 1085, 86 L.Ed. 1478 (1942) (holding that because the plaintiff's "two claims arose out of wholly separate and distinct transactions," the district court's decision on one claim was a final judgment for purposes of Rule 54(b)).

We assume, without deciding, that the federal courts would utilize the Second Restatement's transactional test for determining the identity of claims in this case. Under the Second Restatement, the determination of what "factual grouping constitutes a 'transaction' " is "not capable of mathematically precise definition; it invokes a pragmatic standard to be applied with attention to the facts of the case."

Second Restatement § 24(2), cmt. b. Defining the transaction that makes up a claim involves a consideration of "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations. . . ." *Id.* § 24(2).

Under the Second Restatement test, the claims to the Gila River mainstem asserted by the United States in the Globe Equity litigation would not seem to be part of the same "transaction" as its claims to the tributaries. Because claims to water depend in part on the location of the party asserting the claim, the facts needed to establish a claim to the Gila River mainstem are necessarily spatially distinct from those needed to establish a claim to a tributary. The "origins" of these claims may also be dissimilar. Moreover, the dismissal without prejudice from the Globe Equity litigation of all defendants with claims to the tributaries indicates that the parties determined that the most "convenient trial unit" for claims to the Gila River mainstem was one that excluded the tributaries. That dismissal also indicates that the parties expected that claims to waters of the tributaries would be resolved later.

B.

We need not, however, decide today whether the Second Restatement test, or the earlier "cause of action" test of the First Restatement, governs the preclusive effect of the Decree.[10]

10. Because the Decree was entered in 1935, it is not clear under federal law what test would have applied then. *See Nevada*, 463 U.S. at 131 n. 12, 103 S.Ct. 2906 (noting that more than one test for identity of claims was used in 1944 when the Orr Ditch decree was entered).

Whatever the appropriate test for establishing identity of claims in two actions, it is clear that parties to a consent decree can agree to limit the decree's preclusive effects. "The basically contractual nature of consent judgments has led to general agreement that preclusive effects should be measured by the intent of the parties." 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4443 (1981).[11] Thus, while a judgment will ordinarily preclude later litigation of "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction," Second Restatement § 24(1), that rule does not apply when the parties "have agreed in terms or in effect that the plaintiff" may reserve a portion of its

11. Many federal cases recognize this principle. *See, e.g., United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 911 (9th Cir.1998) ("A settlement can limit the scope of the preclusive effect of a dismissal with prejudice by its terms."); *Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1468 (10th Cir.1993) (quoting same language from Wright & Miller, *supra*, § 4443); *Int'l Union of Operating Eng'rs-Employers Constr. Indus. Pension, Welfare & Training Trust Funds v. Karr*, 994 F.2d 1426, 1432-33 (9th Cir.1993) (holding that parties wishing to "preclude the application of res judicata to a future action . . . can reserve that right" by agreement, and referring to Wright & Miller, *supra*, § 4443); *Keith v. Aldridge*, 900 F.2d 736, 740-41 (4th Cir.1990) (citing Wright & Miller, *supra*, § 4443 for the proposition that "[w]hen a consent judgment entered upon settlement by the parties of an earlier suit is invoked by a defendant as preclusive of a later action, the preclusive effect of the earlier judgment is determined by the intent of the parties"); *May v. Parker-Abbott Transfer & Storage, Inc.*, 899 F.2d 1007, 1010 (10th Cir.1990) ("This court recognizes that consent decrees are of a contractual nature and, as such, their terms may alter the preclusive effects of a judgment.") (citing Wright & Miller, *supra*, § 4443).

claim, *id.* § 26(1)(a). This is because the "main purpose" of precluding further litigation on a claim "is to protect the defendant from being harassed by repetitive actions based on the same claim. The rule is . . . not applicable where the defendant consents, in express words or otherwise" to allow the plaintiff to pursue his claim in multiple suits. *Id.* § 26 cmt. a.[12]

The parties' agreement to limit the preclusive effect of a judgment by permitting the plaintiff to try only a portion of its claim may be either express or implied. *Id.* § 26(1)(a). The Second Restatement elucidates this point:

> After a collision in which A suffers personal injuries and property damage, A commences in the same jurisdiction one action for his personal injuries and another for the property damage against B. B does not make known in either action his objection (usually called "other action pending") to A's maintaining two actions on parts of the same claim. After judgment for A for the

12. In determining the preclusive effect of the Decree, we are mindful that "since consent decrees . . . have many of the attributes of ordinary contracts, they should be construed basically as contracts." *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975) (footnote omitted). The Decree's "scope . . . must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *United States v. Armour & Co.*, 402 U.S. 673, 682, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971). Thus, the Decree "must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." *Id.*

> personal injuries, B requests dismissal of the action for property damage on the ground of merger. Dismissal should be refused as B consented in effect to the splitting of the claim.

Id. § 26 cmt. a, illus. 1. Applying this principle, the Ninth Circuit has held that a county's failure to object in state court proceedings to a plaintiff's attempt to reserve its Fifth Amendment takings claim for federal court impliedly permitted the plaintiff to bring the later federal action. *Dodd v. Hood River County*, 59 F.3d 852, 861-62 (9th Cir.1995).

In addition to permitting parties to limit the preclusive effects of their judgments, federal law recognizes the power of a court in a first action to reserve the plaintiff's right to maintain a second action on part of a claim. *Id.* at 862 ("A court may be able to reserve part of a plaintiff's claim for subsequent litigation by expressly omitting any decision with regard to it in the first judgment."); Second Restatement § 26(1)(b). Thus, when a court determines that its judgment is without prejudice "to a second action on the omitted part of the claim," that determination prevents the first judgment from obtaining preclusive effect in the second action. Second Restatement § 26 cmt. b; *see also* Wright & Miller, *supra*, § 4413 ("A judgment that expressly leaves open the opportunity to bring a second action on specified parts of the claim or cause of action that was advanced in the first action should be effective to forestall preclusion.").

Given this well-recognized right of the parties and the courts to limit the preclusive effect of their judgments, we must determine what claims were actually adjudicated by the Globe

Appendix A

Equity litigation and what preclusive effect the Decree was intended to have.

1.

The first issue we address is whether the Decree adjudicated claims to the tributaries of the Gila River. The starting point in that analysis is the language of the Complaint and the Amended Complaint. The initial Complaint stated that the

> sole source of water necessary and proper for the economical and successful irrigation and cultivation of such lands under the said San Carlos Irrigation Project is the said Gila River *together with its tributaries thereto* lying to the East of the said Gila Indian Reservation, to-wit: The San Pedro River, the San Carlos River, San Francisco River, Blue River and Eagle Creek[.]

Compl. ¶ 5 (emphasis added). The prayer for relief in the initial Complaint asked

> [t]hat the court by its decree determine the relative rights of the parties hereto, in area and extent, and in duration according to their relative rights respectively in priority of appropriation, in to and of the waters of the said *Gila River and its tributaries* in Arizona and New Mexico, including natural flow and flood waters, to the end that it may be known how much of said waters may be diverted from said river by the parties hereto and

> for what purposes, where, by what means of diversion and with what priorities.

Id. ¶ 8 (emphasis added). The Complaint specifically referred to the "Gila River and its tributaries" numerous times, including the report of the waters previously appropriated by the Apache Tribe, *id.* ¶ 3(c), the identification of the defendants and their claims, *id.* ¶ 7, and the prayer for relief, *id.* ¶ 8.

In contrast, the Amended Complaint specifically excludes the Gila River tributaries. In defining the defendants' claims, the Amended Complaint states:

> Each of the defendants . . . claims some right to divert water from the Gila River as it flows between a line 10 miles east of the parallel to the dividing line between Arizona and New Mexico, and the confluence of the Salt River with the Gila River, and *after the following tributaries of the Gila River*, the San Francisco River, the San Carlos River, the San Pedro River, and the Santa Crus [sic] River, respectively, *have joined the main stream*, and all but a few of said diversions being in the District of Arizona; or the said defendants claim some right to store the water of said river, or of some tributary thereof, *either within or above the stretch of the same as just described.*

Am. Compl. ¶ 15 (emphasis added). Thus, the portion of the Gila River placed in dispute by the Amended Complaint was the Gila River *after* the tributaries join the mainstem.

Appendix A

The prayer for relief in the Amended Complaint requested

> [t]hat the Court, by its decree, determine the rights of the parties hereto to the waters of said river and its tributaries and the rights of said parties to divert water from *said river within the area aforesaid* and for storage above, to the end that it may be known how much of said waters may be diverted from *said river* by the parties hereto and for what purposes, where, by what means of diversion and with what priorities.

Id. Prayer (emphasis added). Although the prayer at first seems to suggest that the parties' rights to water in the Gila River tributaries are in fact at issue, it then makes clear that the Government is only seeking to adjudicate rights in the "area aforesaid" and from "said river"-language consistent with the notion that the Amended Complaint was directed only to the parties' rights to waters in the Gila River mainstem. This conclusion is buttressed by paragraph fifteen of the Amended Complaint which makes clear that the "area aforesaid" is the "Gila River . . . after the following tributaries . . . have joined the main stream." *Id.* ¶ 15.

The procedural history of the Decree reinforces this conclusion. After filing the Amended Complaint, the United States obtained the dismissal of all defendants with claims solely to the tributaries of the Gila River. The Decree explicitly states that certain defendants, all of whom maintained claims to the tributaries, were dismissed "because their claims and rights, if any, were and are outside the scope of said suit as same was and is outlined and defined in the amended complaint herein." Both the defendants and their "claim [s] or rights to the use of water

which said defendants . . . now or hereafter may have" were dismissed "without prejudice." This was because "five stipulations between the plaintiff and the defendants" established "that the dismissal of said defendants should be accomplished upon motion of the plaintiff and Order of this Court."

The effect of this dismissal without prejudice was to exclude from the Globe Equity litigation any claims by the dismissed defendants to the tributaries of the Gila River. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (A "dismissal without prejudice is a dismissal that does not operate as an adjudication upon the merits and thus does not have a res judicata effect.") (internal citation and alterations omitted). Indeed, the Decree expressly so states, providing that defendants with claims to the tributaries would "be left as though they never had been named or made parties defendant." The court "confirmed" that the dismissals were "made a part of this decree to protect [the defendants'] rights in that respect." Given that the Decree made plain that it was not resolving the claims of the dismissed defendants to water of the tributaries, it naturally follows that the Decree also did not adjudicate the Tribe's claims to the tributaries, as the dismissed defendants would have been necessary parties to any such adjudication.

Our conclusion that claims to water from the tributaries were not adjudicated by the Decree is further supported by the Decree's schedule of rights and priorities. The Decree states that "the Gila River is the stream from which the water called for under each of said rights is and may be diverted." The portion of the Decree establishing the rights of the various parties to use the waters of the Gila River refers only to the "waters of the Gila River." In enumerating the rights of GRIC, the Apache

Tribe, the San Carlos Project, and the Gila Crossing District to divert water, the Decree specifically refers to their rights to "divert . . . the waters of the Gila River." Similarly, in establishing the parties' storage rights, the Decree refers to "[t]he right . . . to store the waters of the Gila River in the San Carlos Reservoir." Finally, Article XIII states:

> [A]ll of the parties to whom rights to water are decreed in this cause 13. Several parties argue that we should read the phrase "or any thereof" in Article XIII to mean "or any tributary thereof." We decline that invitation. In context, the phrase is most naturally read as referring to a portion of the waters of the Gila River mainstem. are hereby forever enjoined and restrained from asserting or claiming—as against any of the parties herein . . .—any right, title or interest in or to the waters *of the Gila River*, or any thereof, except the rights specified, determined and allowed by this decree, and each and all thereof are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Gila River or any part thereof. . . .

(Emphasis added.)[13]

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13. Several parties argue that we should read the phrase "or any thereof" in Article XIII to mean "or any tributary thereof." We decline that invitation. In context, the phrase is most naturally read as referring to a portion of the waters of the Gila River mainstem.

2.

Notwithstanding this compelling evidence that the Decree was intended to adjudicate only rights in the Gila River mainstem, various parties arguing to the contrary point to language in the Decree regarding the proper method for measuring the amount of water to be diverted by the so called "upper valley defendants":

> [P]rovided further that the drafts on the stream by the upper valley [ ] defendants shall be limited to a seasonal year diversion which will result in an actual consumptive use from the stream of not to exceed 120,000 acre feet of water; said consumptive use made in any seasonal year shall be determined by adding the recorded flows at a gauging station located in the Gila River at Red Rock Box Canyon above the heading of the Sunset Canal in New Mexico *and a gauging station located in the San Francisco River immediately above its confluence with the Gila River* and deducting from said sum the recorded flows at a gauging station located on the Southern Pacific Railway bridge crossing the Gila River near Calva, Arizona[.]

(Emphasis added.) Rather than establishing any right to the waters of the San Francisco River, however, this provision merely establishes a method of measuring flows in the Gila River based on readings at certain gauging stations. Some of the stations used to measure those flows are located on the tributaries that feed into the Gila River, but the Decree does

not establish any party's right to divert from those flows as opposed to the mainstem itself.

ASARCO also argues that the Decree awarded Kennecott, its predecessor, "the water from the San Carlos River." ASARCO relies on a provision in the Decree describing Kennecott's right to divert water when upstream defendants have been given water from the "available storage in the San Carlos Reservoir." When that happens, Kennecott is entitled to an apportionment "of the natural flow of the Gila River" as "gauged by and deemed to correspond with the natural flow of the Gila River and San Carlos River at the points where said streams enter the San Carlos Reservoir." ASARCO claims that this language gives it rights to San Carlos River water.

We do not so read the Decree. Because the Decree establishes the parties' rights to water both from the flow of the Gila River and from waters stored in the San Carlos Reservoir, the Decree required some method for gauging how much of each source was being used. The reference to the San Carlos River upon which ASARCO relies simply enables the Water Commissioner to measure the flow of water *in the Gila River* to which Kennecott is entitled.[14] The provision does not award Kennecott any water from the San Carlos River, nor does any other portion of the Decree.

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14. Kennecott's property was not located on the San Carlos River, but rather on the Gila River, well downstream from the confluence of the San Carlos and Gila Rivers.

3.

SCIDD argues that "the practical impacts" of the Decree indicate that it must have adjudicated rights to waters of the tributaries of the Gila River in addition to the mainstem. SCIDD asserts that because "the Gila River is largely a product of the inflows from the Gila River's tributaries[,] [i]f those tributaries can be dammed or diverted with impunity, the protections offered by the *Globe Equity* Decree are illusory." It does not follow, however, that simply because the rights of parties on the tributaries were not adjudicated in the Globe Equity litigation, such rights are limitless or that parties with claims to the waters of the tributaries may divert the flow of those tributaries with "impunity." The rights of those with claims to the Gila River tributaries will be determined in this Gila River general stream adjudication. To the extent that those rights conflict with rights vested under the Decree, that issue can be addressed by the superior court in future proceedings.

4.

In sum, we conclude that the Decree adjudicated only claims to the Gila River mainstem and not to its tributaries. The Decree therefore has no preclusive effect as to the tributaries.

C.

The next issue is what claims to the mainstem were adjudicated by the Decree. The Tribe argues that the Decree adjudicated only its appropriative rights and not aboriginal

or *Winters* rights. Other parties claim that the Decree adjudicated all claims of the Tribe to the mainstem.

The starting point is once again the language of the Amended Complaint. The Amended Complaint first alleges generally that the members of the Apache Tribe were "occupants and possessors of large areas of land with water rights appertaining thereto." Am. Compl. ¶ 3. The Amended Complaint declares that the United States has the power to assert claims to water on behalf of the Apache Tribe and GRIC because

> on its acquisition from Mexico (by the Treaty of Guadalupe-Hidalgo and the Gadsden Purchase) of the territory within which are the lands occupied by . . . the Apache Indians . . . [the United States] became and ever since has remained the guardian of the Indian inhabitants, including the said Pimas and Apaches, and became the owner of the soil of said territory. . . . The United States, upon such acquisition, furthermore became the full sovereign of said territory, having both national and municipal or State sovereignty; and it had plenary power over said lands and waters.

Id. ¶ 7. The Amended Complaint goes on to allege that

> [t]he Apache Indians, at a long time antedating the acquisition by the United States of the lands ceded as aforesaid by Mexico, occupied and possessed and owned, under the Indian title of

> occupancy and possession . . . a large area which included that now reserved to them by the establishment of their reservation known as the San Carlos Indian Reservation.

Id. ¶ 9.

After establishing a chain of title to the lands of the Apache Tribe, the Amended Complaint asserts that the Tribe's right to water is based on theories of "occupancy and possession":

> These Indians are entitled by their rights of occupancy and possession and on account of the reservations thus made, to sufficient water for the irrigation of the lands deemed necessary for them to irrigate from the Gila River, excluding the San Carlos River, three thousand (3,000) acres of land, which lands are of a good agricultural character and are susceptible of irrigation from said streams and require irrigation to make them capable of producing crops. . . . The said water rights have a priority, antedating all priorities of white persons and as of the date when the Apache Indians first came to occupy said territory, which was before the United States or Mexico acquired sovereignty thereof, as well as a priority as of the date of said first reservation, which was December 14, 1872.

Id. ¶ 9(b).

The Amended Complaint then sets forth a separate claim, based on prior appropriation, with a priority date of between 1873 and 1901:

> The Indians of said San Carlos Reservation irrigated with the waters of the Gila River, exclusive of the waters of the San Carlos River, through a number of ditches on their reservation aforesaid, from the year 1873 to the year 1900, and since, beginning with 100 acres and increasing to 2,500 acres of land in the year 1900, and on account thereof the United States is entitled, as a mere appropriator, to 32 second-feet of water, continuous flow, with a limitation of 12,800 acre-feet of water per annum, with priorities as of . . . prior to the year 1901.

Id. ¶ 10.

Finally, the Amended Complaint summarizes the water rights the United States is claiming for the Tribe. It states that the federal government has

> reserved and appropriated, acquired, and owns, and is entitled to use for said Indian reservations. . . . 37 1/2 second-feet of water with a limitation of 15,000 acre-feet per annum, and 32 second-feet with a yearly limitation of 12,000 acre-feet . . . with priorities, respectively, as of the year 1846, when the United States obtained sovereignty over that territory, as well as of December 14, 1872.

Id. ¶ 14, 14(b) (emphasis added).

Contrary to the Tribe's argument, the Amended Complaint establishes that the United States was asserting rights in addition to those based on prior appropriation. The Amended Complaint describes the Tribe's rights to water both "reserved and appropriated," *id.* ¶ 14, and claims that such rights derive from both "occupancy and possession," *id.* ¶ 9(b). Indeed, because the Amended Complaint asserts a claim to water from 1846, almost thirty years prior to 1873, the first year in which the Tribe is alleged to have begun irrigation, the United States necessarily must have asserted claims under theories in addition to prior appropriation. *Id.* ¶ 14. This is confirmed by the fact that the Amended Complaint claims that the Tribe is entitled to water with two different priority dates, 1846 and 1872. *Id.*

The Decree also indicates that the Globe Equity litigation adjudicated the totality of the Tribe's water rights in the Gila River mainstem. The Decree's introduction states that

> the plaintiff and the parties defendant . . . have concluded and settled *all issues in this cause* . . . and mutually have agreed . . . that such settlement should be embodied in and confirmed and made effective by way of the within decree of the Court in this cause, defining and adjudicating *their claims and rights* as against each other in identical form and substance as hereinafter set forth[.]

(Emphasis added.) Article XIII then states:

> [A]ll of the parties to whom rights to water are decreed in this cause . . . are hereby forever

> enjoined and restrained from asserting or claiming—as against any of the parties herein . . .—*any right, title or interest in or to the waters of the Gila River*, or any thereof, except the rights specified, determined and allowed by this decree, and each and all thereof are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Gila River or any part thereof. . . .

(Emphasis added.) It is difficult to imagine more explicit language indicating that the Decree was intended to resolve all of the parties' claims to the Gila River mainstem.

Based on the language of the Complaint, the Amended Complaint, and the Decree, we conclude that all of the Tribe's water rights, under all theories, to the Gila River mainstem were placed at issue and resolved in the Globe Equity litigation. The Decree precludes all further claims to the mainstem of the Gila River by the parties to the Decree.

IV.

The United States was a party to the Globe Equity litigation, but the Tribe was not. We must therefore next determine whether the United States and the Tribe were in privity in the Globe Equity litigation such that the Tribe is bound by the Decree.[15]

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15. In June of 1935, before the entry of the Decree, the Pima Indian Tribal Council (now GRIC) petitioned for leave to intervene as a party in the Globe Equity litigation; the district court denied the request. The Apache Tribe did not seek to intervene before the entry of the Decree.

Appendix A

We start from the premise that the United States' representation, as trustee, of a tribe in litigation that results in a judgment or decree ordinarily binds that tribe to the decree. The Supreme Court so held in 1912, in a case involving the authority of the federal government to represent the Cherokee Nation in litigation instituted for the return of title to certain Indian lands. *Heckman v. United States*, 224 U.S. 413, 444, 32 S.Ct. 424, 56 L.Ed. 820 (1912). The Court noted that the "efficacy" of the litigation "does not depend upon the Indians' acquiescence" in the litigation. *Id.* at 444-45, 32 S.Ct. 424. Rather, because the United States instituted suit on behalf of the Indians, "[i]t was not necessary to make the [ ] grantors parties, for the government was in court on their behalf." *Id.* at 445, 32 S.Ct. 424. The resulting decree obtained by the Government in the litigation "bind[s] not only the United States, but the Indians whom it represents in the litigation." *Id.* at 445-46, 32 S.Ct. 424.

Similarly, in *Arizona v. California*, the Supreme Court noted that the "United States' action as [the Tribes'] representative w[ould] bind the Tribes to any judgment" entered in the litigation. 460 U.S. 605, 615, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983) (citing *Heckman, 224 U.S. at 444-45, 32 S.Ct. 424).* The Court noted that, absent certain specific language included in the decree in that case, "[t]here is no question that if these claims [currently asserted by the Tribe] were presented in a different proceeding, a court would be without power to reopen the matter due to the operation of res judicata." *Id.* at 617, 103 S.Ct. 1382.

Appendix A

A.

The Tribe nonetheless argues that the United States lacked authority to represent it in the Globe Equity litigation. First, the Tribe asserts that "the United States lacked any authority from Congress to represent the Apache Tribe in [the] Globe Equity [litigation] ··· which would preclude the application of res judicata."

This argument fails. In 1893, Congress enacted legislation specifically providing that "[i]n all States and Territories where there are reservations or allotted Indians the United States District Attorney shall represent them in all suits at law and in equity." Act of Mar. 3, 1893, ch. 209, § 1, 27 Stat. 631 (codified as amended at 25 U.S.C. § 175 (2001)). Here, the Amended Complaint expressly alleges that the Globe Equity litigation was "instituted at the suggestion of the Secretary of the Interior and by the direction and authority of the Attorney General." Am. Compl. ¶ 3. This allegation makes plain that the United States was proceeding pursuant to authority expressly granted by Congress. *See Heckman*, 224 U.S. at 445-46, 32 S.Ct. 424 ("[I]f the United States . . . is entitled to bring a suit of this character, it must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation.").

Second, the Tribe argues that the Decree is "without validity as to the Tribe" because there was no "clear congressional authorization to extinguish Apache Tribal water rights, as required by the federal common law and the

Nonintercourse Act, 25 U.S.C. § 177."[16] In support of this argument the Tribe relies primarily on *County of Oneida v. Oneida Indian Nation*, which held that "the Nonintercourse Act[ ] simply 'put into statutory form what was or came to be the accepted rule-that the extinguishment of Indian title required the consent of the United States.' " 470 U.S. 226, 240, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 678, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974)).

The *Oneida* doctrine has no application here. The Decree served to *determine* the scope of the Tribe's water rights, not to *extinguish* them. The Ninth Circuit expressly recognized this distinction between the definition of tribal rights and the extinguishment thereof in *United States v. Ahtanum Irrigation District* ("*Ahtanum I*"), 236 F.2d 321 (9th Cir.1956), and *United States v. Ahtanum Irrigation District* ("*Ahtanum II*"), 330 F.2d 897 (9th Cir.1964). *Ahtanum I* held that the Secretary of the Interior "had the power" to enter into an "arrangement for the apportionment of the Ahtanum waters" under his "general powers of supervision and management" over Indians. 236 F.2d at 338. In *Ahtanum II*, the court clarified that

> it must be plain from our original opinion that if we ha[d] been called upon to uphold the power of

16. In relevant portion, the Nonintercourse Act provides that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177 (2001).

> the Secretary of the Interior *to make a conveyance of the waters of Ahtanum Creek* to these white landowners we would have been confronted with a very serious question indeed-a much more difficult question than that which we decided.

330 F.2d at 903 (emphasis added).

More recently, in *United States v. Truckee-Carson Irrigation District*, a case involving the Pyramid Lake Paiute Tribe's attack on the 1944 Orr Ditch Decree, the Ninth Circuit affirmed the notion that "[t]he authority to represent the Tribe in litigation must be distinguished from the authority to extinguish tribal property interests." 649 F.2d 1286, 1300 (9th Cir.1981), *amended by* 666 F.2d 351 (9th Cir.1982), *aff'd in part and rev'd in part on other grounds sub nom. Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983). The court found that section 10 of the Reclamation Act of 1902 did not "confer[ ] on the Secretary [of the Interior] authority to extinguish the Pyramid Lake Tribe's water rights." *Id.* at 1298. Nonetheless, the court held that "an action to quantify reserved water rights was within the authority conferred by section 10 of the Reclamation Act of 1902." *Id.* at 1300.

The 1924 Act "[f]or the continuance of construction work on the San Carlos Federal irrigation project in Arizona" contains language nearly identical to that of section 10 of the Reclamation Act of 1902.[17] Act of June 7, 1924, ch. 288,

17. Section 10 of the Reclamation Act of 1902 provides: "[T]he Secretary of the Interior is hereby authorized to perform any and all (Cont'd)

§ 5, 43 Stat. 475, 476. Thus, while the Government may not have had authority to "extinguish" the Tribe's right to water in the Globe Equity litigation, it possessed the power to "represent [the Tribe's] interests in [the] litigation" in order to "quantify [the Tribe's] reserved water rights." *Truckee-Carson*, 649 F.2d at 1300.[18]

B.

1.

The Tribe next asserts that the United States' representation of the Tribe in the Globe Equity litigation was so inadequate as to prevent the presence of privity between

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(Cont'd)

acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect." Reclamation Act of 1902, ch. 1093, § 10, 32 Stat. 388, 390 (codified in scattered sections of 43 U.S.C.). The 1924 Act provides: "The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect[.]" Act of June 7, 1924, ch. 288, § 5, 43 Stat. 475, 476.

18. The Tribe argues in the alternative that the superior court erred "where it failed to conclude that the issue of lack of authority is a disputed genuine issue[ ] of material fact." The Tribe, however, identifies no such issue of fact. Because the United States had statutory authority to represent the Tribe, we affirm the superior court's determination that there are no genuine issues of material fact precluding a grant of summary judgment against the Tribe on this issue.

the Tribe and the Government.[19] The Tribe relies on § 42(1)(e) of the Second Restatement, which provides, in relevant part, as follows:

> (1) A person is not bound by a judgment for or against a party who purports to represent him if:
>
> . . . .
>
> (e) The representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent.

The Tribe contends that, in the Globe Equity litigation, the Government ignored the Tribe's substantial rights to Gila River water under the *Winters* doctrine, prosecuted the case while under an actual conflict of interest, and staffed the case with attorneys biased against the Tribe. Moreover, the Tribe alleges that "[t]he United States' representation of the Tribe was so grossly deficient as to provide notice to the opposing parties of this fact, and to create no legitimate claim of justifiable reliance by them."

We begin by assuming, without deciding, that the United States' representation of the Tribe in the Globe Equity litigation produced less than desirable results for the Tribe. However, our job in this case is not to re-evaluate the litigation skills and strategies of the Government's attorneys

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19. While the United States does not agree that it provided the Tribe with inadequate representation, it supports the Tribe's request for an evidentiary hearing on the claim.

seventy years after their efforts resulted in the entry of the Decree. Rather, we must apply federal law, giving the Decree the same preclusive effects as would the federal courts. *Cf. Locklin v. Switzer Bros., Inc.*, 335 F.2d 331, 334 (7th Cir.1964) ("[A] 'foreign' federal court will not set aside a judgment, in an independent equitable action, unless the judgment would be set aside on those same grounds by the 'home' federal court.") (citing *Bros. Inc. v. W.E. Grace Mfg. Co.*, 320 F.2d 594, 607 (5th Cir.1963)). Thus, we must determine what preclusive effect the United States District Court for the District of Arizona would provide the Decree.

Our role is analogous to that of a federal court applying state court preclusion principles to a previous state court judgment. *See* U.S. Const. art. IV, § 1; 28 U.S.C. § 1738 (1994); *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985) (" 'It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.' ") (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481-82, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982)). As the Second Restatement points out, "[i]t has long been established that the judgments of the federal courts are to be accorded full faith and credit when a question of their recognition arises in a state court or in another federal court." Second Restatement § 87 cmt. a.

2.

The Supreme Court has never expressly held that the Government's representation of a tribe can be so inadequate as to remove privity. The Court, however, has twice rejected similar arguments in cases analogous to this one. In *Arizona v. California*, the Court held that the Government's concurrent representation of five tribes in litigation involving the Colorado River did not "authorize relitigation of their reserved rights." 460 U.S. at 626, 103 S.Ct. 1382. The Court held that

> [a] breach of the United States' duty to represent the Tribes' interests is not demonstrated merely by showing that the government erred in its calculation of irrigable acreage, whether by an oversight or, as viewed in retrospect, by an unnecessarily cautious litigation strategy. . . . [A] claim of inadequate representation cannot be supported on this record.

Id. at 628 n. 21, 103 S.Ct. 1382.

The Court reached a similar result in *Nevada*, holding that the Paiute Tribe was bound by the Government's representation in the Orr Ditch litigation:

> This Court left little room for an argument to the contrary in *Heckman v. United States*, where it plainly said that "it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the

> jurisdiction of its courts . . . these wards should themselves be permitted to relitigate the question." We reaffirm that principle now.

463 U.S. at 135, 103 S.Ct. 2906 (internal citations omitted, alteration in original).

The Tribe argues that this case is factually distinguishable from the Supreme Court precedents and that the Court would apply § 42(1)(e) of the Second Restatement and find an absence of privity with respect to the Globe Equity Decree. We need not today resolve that issue, however, because we conclude that the doctrine of comity compels us to refrain from addressing the Tribe's arguments.

3.

Ordinarily, relief from a judgment "must be obtained by means of a motion for that purpose in the court that rendered the judgment unless relief may be obtained more fully, conveniently, or appropriately by some other procedure." Second Restatement § 78. In the federal courts, such a motion is governed by Federal Rule of Civil Procedure 60(b).[20]

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20. Rule 60(b) provides:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly

(Cont'd)

Appendix A

Consent decrees are subject to the requirements of Rule 60(b). *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992).

Under Rule 60(b), a court may also "entertain an independent action to relieve a party from a judgment. . . ." As a general matter, that action "may or may not be begun in

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(Cont'd)

> discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

the court which rendered the judgment." Fed.R.Civ.P. 60(b) advisory committee's note (1946 Amendment, Subdivision (b)); *see also Locklin*, 335 F.2d at 334 (stating that an "independent equitable action may be maintained in any court exercising equitable jurisdiction").

However, even if Rule 60(b) facially grants us the power to consider the Tribe's privity arguments in an "independent" attack on the Decree, the doctrine of comity counsels to the contrary. "The principle [of comity] is that a court should not assume to disturb another court's disposition of a controversy unless there are good reasons for doing so." Second Restatement § 78 cmt. a.

Lapin v. Shulton, Inc., 333 F.2d 169 (9th Cir.1964), illustrates the application of the comity doctrine. In that case, the Ninth Circuit affirmed a district court's refusal to entertain an action challenging an injunction issued by the United States District Court for the District of Minnesota on the grounds "that changed circumstances had rendered inequitable the prospective application of the decree." *Id.* at 170. The court held that

> for a nonissuing court to entertain an action for such relief would be seriously to interfere with, and substantially to usurp, the inherent power of the issuing court . . . to supervise its continuing decree by determining from time to time whether and how the decree should be supplemented, modified or discontinued in order properly to adapt it to new or changing circumstances.

Id. at 172. The Ninth Circuit found that it "need not go so far as to hold that these considerations and this interpretation of Rule 60(b) deprive all courts other than the issuing court of jurisdiction in such a case as this." *Id.* Nonetheless, "considerations of comity and [the] orderly administration of justice demand that the nonrendering court should decline jurisdiction of such an action and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there." *Id.*

Similarly, in *Treadaway v. Academy of Motion Picture Arts & Sciences*, the Ninth Circuit, following *Lapin*, held that a district court could "refuse entirely to entertain [an] action if relief in a more appropriate forum-the rendering court-were available." 783 F.2d 1418, 1421 (9th Cir.1986) (footnote omitted). In that case, the plaintiff brought an independent action under Rule 60(b) in a district court challenging a bankruptcy court's sale of certain films, photographs, and scripts. *Id.* at 1419-20. In affirming the district court's refusal to consider the action, the Ninth Circuit confirmed that *Lapin*"was germane to independent attacks on all types of final judgments." *Id.* at 1422. The court emphasized that "[w]hen a court entertains an independent action for relief from the final order of another court, it interferes with and usurps the power of the rendering court just as much as it would if it were reviewing that court's equitable decree." *Id.*

Because "discretion requires a [federal] district court to decline to hear a claim seeking relief from a judgment entered by a coordinate court, at least when it is apparent that the parties can seek redress in the issuing court," *Feller v. Brock*,

802 F.2d 722, 728 (4th Cir.1986), this Court should ordinarily decline to entertain an independent action challenging the validity of a federal decree. Such comity to the federal courts is particularly appropriate here.

The issuing federal court-the United States District Court for the District of Arizona-expressly retained jurisdiction over the interpretation and enforcement of the Decree in 1935. That court continues to actively "review the actions of the Water Commissioner and to enforce the Decree." *United States v. Gila Valley Irrigation Dist.* ("*GVID III*"), 961 F.2d 1432, 1434 (9th Cir.1992). The Tribe is a party to the federal litigation, having been granted permission to intervene in 1990.

In its motion to intervene, the Tribe made clear that none of the allegations in its complaint in intervention sought "to vacate the Decree, or re-litigate issues." Thus, in federal court, the Tribe has declared that it "does not seek to litigate rights to additional Gila River water in this matter, and [that] no allegations have been made in the proposed Complaint in Intervention regarding *Winters* water rights."

The limited nature of the Tribe's intervention in the federal litigation does not, of course, establish its acquiescence in the Decree's validity. It is clear, however, that the Tribe has consciously declined to adjudicate its "inadequate representation" claim in the forum responsible for issuing, interpreting, and enforcing the Decree. Notions of comity would be seriously undermined if we were to permit the Tribe to assert the very arguments in this Court that it has explicitly pretermitted in the federal court.

Appendix A

The Tribe presumably moved to intervene in the federal litigation only for limited purposes because the district court had already intimated its view of a tribe's ability to challenge both the validity of the Decree and the adequacy of the United States' representation in the Globe Equity litigation. In 1983, GRIC "successfully moved to intervene as a plaintiff" in the federal litigation interpreting the Decree. *GVID III*, 961 F.2d at 1434. In granting GRIC's motion, however, the district court prohibited GRIC from intervening "for the purpose of vacating the Decree or relitigating the issues resolved by the Decree." The court noted that GRIC's motion to intervene was filed forty-seven years after the entry of the Decree:

> To the extent GRIC seeks to vacate the Decree or to relitigate the issues the Decree resolves, it is hard to imagine a more untimely motion. The prejudice to the parties that is posed by GRIC's avowed intent at this late date to dismantle the Decree is manifest. Water is lifeblood to the land affected by the Decree and the Decree apportions much of the available water. To permit an attack now on the Decree would cast the apportionment of Gila River water into a legal limbo, perhaps of many years duration, that would be detrimental to the interests of all the parties to the Decree.

In addition, the district court expressly refused to consider GRIC's argument that the United States' representation of GRIC in the Globe Equity litigation had been inadequate, stating that it was "too late in the day for GRIC now to complain of its representation back in 1935." GRIC's

intervention was thus made "subject to the condition that any complaint that GRIC files in the action must seek only to enforce the Decree and not to vacate the Decree or to relitigate issues already determined by the Decree."

The Tribe argues that the district court's 1983 ruling with respect to GRIC's intervention establishes that the Tribe cannot obtain relief in the court that issued the Decree, and therefore the Tribe should be allowed to pursue such relief here. But we take precisely the opposite message from the 1983 ruling. Our task, after all, is to accord the Decree the same preclusive effect as would the issuing federal court. The 1983 ruling tells us that the issuing court would not entertain an attack on the Decree, despite its facial power under Rule 60(b) to do so, because of untimeliness. Comity requires that we respect that determination; a contrary determination would reward a party who had waited too long to attack a judgment in federal court by providing a state forum.

Had the Tribe believed that the district court erred in refusing to allow GRIC to intervene to attack the Decree, it could have sought to attack the Decree in its 1990 motion to intervene and then sought federal appellate review from any denial thereof. Had it done so, the federal courts could have conclusively addressed the issue. If we were today to consider the Tribe's privity arguments, we would be in effect rewarding its strategic choice to withhold making those arguments in the court that issued the Decree in order to seek a more favorable forum here. The doctrine of comity requires

a different result.[21] We therefore decline to consider the Tribe's attack on the Decree on the basis of absence of privity.[22]

V.

Phelps Dodge, SRP, and Safford, none of whom were parties to the 1935 Decree (the "Nonparties"), argue that they should nonetheless be able to assert the preclusive effect of the Decree against the Tribe and the United States. Ordinarily the application of claim preclusion requires "mutuality"—both the party asserting the preclusive effect of a prior judgment and the party against whom preclusion is asserted must have been parties in the prior litigation. *Nevada*, 463 U.S. at 143, 103 S.Ct. 2906. In certain circumstances, however, "exceptions to the *res judicata* mutuality

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21. We express no opinion as to what other remedies, if any, might be available to the Tribe for the Government's allegedly inadequate representation. *See Arizona v. California*, 460 U.S. at 628 n. 20, 103 S.Ct. 1382 (noting that "in an appropriate case the Tribes' remedy for inadequate representation by the government may lie in the Court of Claims").

22. Arizona law requires that "when rights to the use of water or dates of appropriation have previously been determined in a prior decree of a court, the court *shall accept* the determination of such rights and dates of appropriation as found in the prior decree. . . ."A.R.S. § 45-257(B)(1) (emphasis added). Given our conclusion as a matter of federal law that the doctrine of comity prevents us from considering the Tribe's argument that the Decree should not be enforceable against it because of the absence of privity, we need not consider today whether § 45-257(B)(1) also requires the same result as a matter of state law.

requirement have been found necessary. . . ." *Id.* The Supreme Court established such an exception in *Nevada*, holding that the Orr Ditch litigation was "a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to." *Id.* Because of the scope of the litigation, "[n]onparties [including] subsequent appropriators . . . have relied just as much on the *Orr Ditch* decree in participating in the development of western Nevada as have the parties to that case." *Id.* at 144, 103 S.Ct. 2906. Under those circumstances, the Court recognized a limited exception to the requirement of mutuality for claim preclusion, enabling those later appropriators to assert the preclusive effect of the decree against parties to the decree.

In this case, the Nonparties argue that the Globe Equity litigation was sufficiently comprehensive to qualify for the *Nevada* mutuality exception; they also claim that they have relied on the Decree in the same manner as did the later appropriators in *Nevada* and should be able to use the Decree's preclusive effect against parties to the Decree.[23] In opposition, the Tribe and the United States argue that because the United States "expressly limited the Globe Equity proceedings to a defined segment of the Gila River exclusive of tributaries," the Globe Equity litigation was not sufficiently "comprehensive" to qualify for the mutuality exception

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23. As parties to the Decree, or successors in interest to parties to the Decree, ASARCO, GVID, FID, and SCIDD are entitled to assert the preclusive effect of the Decree and need not rely on the *Nevada* mutuality exception to claim preclusion.

outlined in *Nevada.*[24] In addition, the United States argues that because the Decree grants "compromise" rights in addition to establishing priorities under the doctrine of prior appropriation, subsequent appropriators would not be justified in relying on the Decree when appropriating water, and are therefore not entitled to assert the preclusive effect of the Decree.

We have concluded above that the Decree was intended to resolve all claims to the Gila River mainstem. The United States included as defendants in the Globe Equity litigation all those with claims to the mainstem of the Gila River, and the Decree includes all water rights theories that the parties could have asserted. Thus, as to the mainstem of the Gila River, the Decree is comprehensive. In addition, given the long history of the Decree, it is clear that those not party to the Decree have in fact relied upon it in the same manner as the later appropriators in *Nevada.* With respect to the Gila River mainstem, the *Nevada* exception to mutuality applies and those who were not party to the Decree are entitled to assert its preclusive effects against parties to the Decree and their successors.

None of the Nonparties, however, seek to assert the preclusive effect of the Decree as to the Gila River mainstem. Rather, the Nonparties claim that under the *Nevada* mutuality exception they are entitled to assert the preclusive effect of the Decree as to waters of the Gila River *tributaries.* Because we have determined that the Decree itself precludes only

24. GRIC joins the Tribe and the United States in this argument, but focuses its brief on refuting the ability of Phelps Dodge in particular to assert the preclusive effects of the Decree.

additional claims to the mainstem, any assertion of preclusive effect by the Nonparties with respect to waters of the tributaries fails.

VI.

The Gila River general stream adjudication consists of a series of cases organized by watershed and by petitioner. The case we today consider, denominated W1-206, involves claims by the Apache Tribe and the United States on the Tribe's behalf. Case W1-203 involves claims by GRIC and the United States on GRIC's behalf.

Before issuing its order in this case, the superior court considered similar summary judgment motions in W1-203. On March 7, 2002, the superior court issued an order in W1-203, granting summary judgment to those parties who had filed motions arguing that the Decree precluded GRIC or the United States on GRIC's behalf from asserting additional claims for water in the Gila River. The court concluded that "neither GRIC nor the United States on behalf of GRIC shall be entitled to claim water rights relating to the mainstem of the Gila River . . . except to the extent such rights were granted to them by the *Globe Equity Decree.*"

When it issued its May 17, 2002 order in case W1-206, the superior court stated that it "ha[d] considered all filed memoranda and arguments of counsel and ha[d] otherwise become fully advised as to the issues presented." The court then

> [g]rant[ed] the motions for summary judgment filed by GRIC, SCAT, Safford, GVID and FID

> jointly, SCIDD, Phelps Dodge, and ASARCO to the extent that these motions seek a determination that preclusive effect of the *Globe Equity Decree* is applicable to the parties consistent with the findings and conclusions set forth in this court's Amended Order . . . that was entered in contested case No. W1-203.

The Apache Tribe argues that the superior court "committed clear error by adopting the findings and conclusions in the Amended Order in W1-203 for GRIC as the sole basis for granting summary judgment against the Tribe in W1-206." According to the Tribe, a determination of the preclusiveness of the Decree required "**separate** examination of the unique factual history involving these two very different Indian Tribes . . . and . . . separate consideration of the different legal arguments made by the Tribe and GRIC on summary judgment. . . ."

We have today determined the preclusive effects of the Decree as a matter of law based on our interpretation of the Decree and the filings in the Globe Equity litigation leading to the Decree. This legal determination of the Decree's preclusive effects makes any factual differences between cases W1-203 and W1-206 irrelevant. Because our opinion does not rely upon any factual determinations, but rather only on the record in the Globe Equity litigation, the Tribe's arguments about the form of the order below do not affect our conclusions.[25]

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25. One of the issues on which we granted review was whether the superior court erred in failing to determine that the Decree or

(Cont'd)

VII.

In summary, for the reasons stated above, we hold that the Globe Equity Decree precludes the Apache Tribe and the United States on the Tribe's behalf from asserting claims to water from the mainstem of the Gila River beyond those rights granted in the Decree, but that it does not preclude claims to the tributaries of the Gila River. (Tribe's issue 1.) This holding also addresses the single issue raised by Phelps Dodge in its cross-appeal. We hold that the superior court's reference in case W1-206 to its order in W1-203 was not reversible error. (Tribe's issue 2.) We decline on grounds of comity to address the Tribe's argument that the Decree is not entitled to preclusive effect because of an absence of privity. (Tribe's issue 3.) We hold that the Government was vested with the authority to represent the Tribe in the Globe Equity litigation and to litigate the extent of the Tribe's water rights. (Tribe's issue 4.) We vacate our order granting interlocutory review of the effect of the Landowners' Agreements on any claims by GRIC to the San Carlos River. (Tribe's issue 5.) We hold that the *Nevada* exception allows non-parties to the Decree to assert its preclusive effect, but only as to waters in the Gila River mainstem. (Tribe's issue 6.)

(Cont'd)

the Landowners' Agreements of 1924 specifically preclude GRIC and the United States on behalf of GRIC from claiming any rights to the San Carlos River in the Gila River general stream adjudication. *See supra* note 5. Because this issue would be more appropriately addressed in any review of the summary judgment order in W1-203 by GRIC, we vacate our order granting review of this issue as improvidently granted.

The May 17, 2002 order of the superior court is therefore affirmed to the extent that it holds that the Decree has preclusive effect with respect to claims by the Tribe and the United States to waters in the Gila River mainstem. The order is also affirmed to the extent that it concludes that the Decree has no preclusive effect with respect to the tributaries of the Gila River. This case is remanded to the superior court for further proceedings consistent with this opinion.

Andrew D. Hurwitz, Justice

CONCURRING:

Ruth V. McGregor, Chief Justice

Rebecca White Berch, Vice Chief Justice

Michael D. Ryan, Justice

A. John Pelander, Judge*

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* Pursuant to Article 6, Section 3 of the Arizona Constitution, the Honorable A. John Pelander, Chief Judge of the Arizona Court of Appeals, Division Two, was designated to sit in this matter.

APPENDIX B — ORDER OF THE SUPREME COURT OF ARIZONA DENYING MOTION FOR RECONSIDERATION FILED MAY 3, 2006

SUPREME COURT OF ARIZONA

No. WC-02-0003-IR

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE.

May 3, 2006

ORDER DENYING MOTION FOR RECONSIDERATION

ANDREW D. HURWITZ, Justice.

We issued our opinion in this matter on February 9, 2006. *In re the General Adjudication of All Rights to Use Water in the Gila River System & Source*, 212 Ariz. 64, 127 P.3d 882 (2006). On February 27, 2006, the San Carlos Apache Tribe ("Tribe") filed a motion for reconsideration. That motion was untimely under ARCAP 22(b).[1] We have nonetheless decided

1. A motion for reconsideration must be filed "within fifteen days after the filing of a decision by the appellate court." ARCAP 22(b). Because this Court issued its opinion on February 9, the last day to file a motion was February 24. The Tribe's motion was apparently mailed to the clerk of this Court on February 24, but ARCAP 4(a) provides that only briefs and appendices, not motions, are considered filed on the day of mailing.

to suspend the time limits in ARCAP 22(b) and consider the merits of the motion. See ARCAP 3 (providing that an appellate court may "suspend the requirements or provisions of any of these rules in a particular case" and that "[t]hese rules shall be liberally construed in the furtherance of justice").

The motion for reconsideration is directed only to that portion of our opinion discussing the Tribe's claims that the Globe Equity Decree ("Decree") should be given no preclusive effect because of the United States' allegedly inadequate representation of the Tribe. *Gila River System*, 212 Ariz. at 79 ¶¶ 56-73, 127 P.3d at 897-901. We declined under the doctrine of comity to consider that claim. *Id.* at 81-83 ¶¶ 64-73, 127 P.3d at 899-901. The Tribe now argues that the doctrine of comity is inapplicable because the Globe Equity court lacked jurisdiction to consider a challenge to the Decree based upon inadequate representation by the United States. In particular, the Tribe argues that the federal district court was deprived of such jurisdiction by the McCarran Amendment, 66 Stat. 560, 43 U.S.C. § 666 (1952), and by the opinion of the Ninth Circuit in *Northern Cheyenne Tribe v. Adsit*, 721 F.2d 1187 (9th Cir.1983).

I.

The McCarran Amendment provides in relevant part that, notwithstanding sovereign immunity, the United States may be joined as a party in state court general water adjudications and bound by the judgments of state courts. 43 U.S.C.

Appendix B

§ 666(a).[2] The Supreme Court of the United States has made plain, however, that the Amendment merely gave "consent

2. The McCarran Amendment, also called the McCarran Water Rights Suit Act, provides:

> (a) Joinder of United States as defendant; costs Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.
>
> (b) Service of summons
>
> Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.
>
> (c) Joinder in suits involving use of interstate streams by State
>
> Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

43 U.S.C. § 666.

to jurisdiction in the state courts concurrent with jurisdiction in the federal courts over controversies involving federal rights to the use of water," *Colorado River Water Conservation District v. United States* (" *Colorado River* "), 424 U.S. 800, 809, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), and "in no way diminished federal-district-court jurisdiction," *id.*

Colorado River, while rejecting the notion that the McCarran Amendment deprived federal courts of jurisdiction in general stream adjudications, also held that under the circumstances of the controversy before it, the district court should have dismissed the case to allow a Colorado state general stream adjudication to proceed. *Id.* at 817-20, 96 S.Ct. 1236. That holding received extensive attention in an action commenced by the San Carlos Apache Tribe in 1979 in the United States District Court for the District of Arizona (the "San Carlos federal litigation"). The Tribe's complaint sought an adjudication of its federal water rights in several water systems.[3]

The district court dismissed the San Carlos federal litigation, relying upon *Colorado River* and the pendency of various Arizona state court general stream adjudications. *In re Determination of Conflicting Rights to Use of Water from Salt River Above Granite Reef Dam*, 484 F.Supp. 778 (D.Ariz.1980). The Ninth Circuit reversed. *San Carlos*

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3. The San Carlos federal litigation was a distinct suit seeking a determination of the Tribe's water rights under federal law, not an action seeking to amend the Globe Equity Decree and not an "independent action" under Rule 60(b) requesting relief from the Decree.

Appendix B

Apache Tribe of Ariz. v. Arizona, 668 F.2d 1093 (9th Cir.1982). The Supreme Court granted certiorari and in turn reversed the Ninth Circuit. *Arizona v. San Carlos Apache Tribe of Arizona* (" *San Carlos* "), 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983).

San Carlos began from the premise that " *Colorado River*, of course, does not require that a federal water suit must always be dismissed or stayed in deference to a concurrent and adequate comprehensive state adjudication." *Id.* at 569, 103 S.Ct. 3201. The Court, however, found that a number of factors counseled against the district court proceeding with the San Carlos federal litigation, particularly the relative infancy of the federal litigation, which had not proceeded beyond the motion to dismiss stage. *Id.* at 570-71, 103 S.Ct. 3201. The Court left open the question of whether the San Carlos federal litigation should be stayed pending the Arizona general stream adjudications or dismissed without prejudice. *Id.* at 570 n. 21, 103 S.Ct. 3201.

On remand, the Ninth Circuit determined that the San Carlos federal litigation was

> "well enough along so that dismissal would itself constitute a waste of judicial resources and an invitation to duplicative effort." A stay of the federal action[ ] would be preferable to a dismissal here so the federal forum would most readily be available if warranted by a "significant change of circumstances."

Northern Cheyenne Tribe,[4] 721 F.2d at 1188 (quoting *San Carlos*, 463 U.S. at 569, 570 n. 21, 103 S.Ct. 3201) (internal citation and alteration omitted). The court therefore ordered the San Carlos federal litigation be stayed. *Id.* at 1189.

II.

The Tribe's motion for reconsideration argues that the McCarran Amendment and the Ninth Circuit stay of the San Carlos federal litigation deprive the district court of the ability to consider any attack on the Globe Equity Decree because of alleged ineffective representation by the United States. The argument does not withstand analysis.

The McCarran Amendment did not itself deprive the Globe Equity court of jurisdiction to enforce and interpret the 1935 consent decree. *Colorado River* and *San Carlos* each stress that the Amendment *confers* state court jurisdiction, rather than *withdrawing* federal jurisdiction. *See San Carlos*, 463 U.S. at 559-60, 570-71, 103 S.Ct. 3201; *Colorado River*, 424 U.S. at 809, 96 S.Ct. 1236. Indeed, even after *Colorado River* and *San Carlos*, the Globe Equity court has continued to actively "review the actions of the Water

4. In *San Carlos*, the Supreme Court consolidated and reversed three decisions of the Ninth Circuit, including its decision in the San Carlos federal litigation. *See* 463 U.S. 545, 103 S.Ct. 3201 (consolidating *San Carlos Apache v. State of Arizona*, 668 F.2d 1093 (9th Cir.1982), *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir.1982), and *Navajo Nation v. United States*, 668 F.2d 1100 (9th Cir.1982)). On remand, the Ninth Circuit addressed all three cases in its opinion in *Northern Cheyenne Tribe*. *See* 721 F.2d at 1188.

Commissioner and to enforce the Decree." *United States v. Gila Valley Irrigation Dist.*, 961 F.2d 1432, 1434 (9th Cir.1992); *see also San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1098-99 (9th Cir.2005) (rejecting the Tribe's argument that it may bring a claim under the National Historic Preservation Act alleging that the current implementation of the Decree violates that Act). In fact, the Tribe itself recently sought to enforce rights granted to it in the Decree in the Globe Equity court. *See San Carlos Apache Tribe v. United States*, 272 F.Supp.2d 860, 867 (D.Ariz.2003) ("Plaintiffs allege that there has been a material change in circumstances that justifies modification of the comprehensive management provisions for operating the [San Carlos] Reservoir that are set out in the Gila River Decree."), *aff'd*, 417 F.3d 1091 (2005), and 144 Fed.Appx. 635 (2005) (unpublished opinion).

Nor does *San Carlos* or *Northern Cheyenne Tribe* compel a different result. These cases involve the stay of the embryonic *San Carlos federal litigation*, not the long-standing Globe Equity litigation. The Globe Equity litigation had been under way for almost 60 years before the Ninth Circuit stayed the San Carlos federal litigation in 1983 and has proceeded actively in the almost quarter-century since. Thus, there is simply no warrant for concluding that the Globe Equity court has somehow been deprived by the McCarran Amendment, or by the cases interpreting the Amendment, of the ability to consider attacks on the validity of the 1935 Decree.

Appendix B

III.

In short, the Tribe's contention that the doctrine of comity is inapplicable because the Globe Equity court lacked the ability to consider the Tribe's attacks on the 1935 Decree is not well-founded. The Tribe's motion for reconsideration is denied.

Dated this 3rd day of May, 2006.

Andrew D. Hurwitz, Justice

CONCURRING:

Ruth V. McGregor, Chief Justice

Rebecca White Berch, Vice Chief Justice

Michael D. Ryan, Justice

A. John Pelander, Judge[5]

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5. Pursuant to Article 6, Section 3 of the Arizona Constitution, the Honorable A. John Pelander, Chief Judge of the Arizona Court of Appeals, Division Two, was designated to sit in this matter.

APPENDIX C — ORDER OF THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA DATED MAY 17, 2002

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

W-1 (Salt)
W-2 (Verde)
W-3 (Upper Gila)
W-4 (San Pedro)
Consolidated

Contested Case No. W1-206

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE

IN RE THE PRECLUSIVE EFFECT OF THE *GLOBE EQUITY NO. 59 DECREE* ON SPECIFIED PARTIES

ORDER

Hearings were held on April 23, 2002, on the requests for summary disposition and related motions pending in the above-referenced docket. Motions for summary judgment were filed by the Gila River Indian Community ("GRIC"); San Carlos Apache Tribe ("SCAT"); City of Safford ("Safford"); Gila Valley Irrigation District ("GVID") and Franklin Irrigation District ("FID") jointly; San Carlos Irrigation and Drainage District ("SCIDD"); Phelps Dodge

Corporation ("Phelps Dodge"); and ASARCO Incorporated ("ASARCO").

GRIC filed a motion to withdraw its summary judgment request with respect to Phelps Dodge. GRIC and Safford filed motions related to the scope of this contested case in terms of parties. SCAT and both the Buckeye Irrigation Company and the Buckeye Water Conservation and Drainage District ("the Buckeye organizations") filed a stipulation regarding the preclusive effect of a prior settlement agreement among these parties and a subsequent judgment and decree.

At the hearing, GVID and FID filed a Motion to Strike SCAT's Notice of Errata and "Corrected" Statement of Facts.

The court has considered all filed memoranda and arguments of counsel and has otherwise become fully advised as to the issues presented.

IT IS ORDERED:

1. Granting GRIC's Motion to Remove Phelps Dodge as Clerk of the Court a Named Party from GRIC's Motion for Partial Summary Judgment.

2. Directing SCAT and the Buckeye organizations to submit a joint form of order memorializing the terms of their stipulation filed in this matter on June 20, 2001.

3. Rescinding this court's order dated June 27, 2001, denying Safford's Motion to Strike GRIC's Motion for Partial Summary Judgment. The court has now

considered the merits of the legal issues raised by Safford's motion.

4. Granting Safford's Motion to Strike GRIC's Motion for Partial Summary Judgment to the extent that GRIC's motion seeks relief as to claimants who are not parties in this contested case. Special Master Thorson specified the affected parties at the commencement of Contested Case No. W1-206, and the other claimants named in GRIC's motion did not have an opportunity to participate in the matter. Accordingly, due process concerns dictate that the court grant the Motion to Strike.

5. Denying GRIC's alternative motion to include in this contested case other parties, in addition to SCAT, GVID, and FID, who are in privity with owners or are claimants of water rights decreed in *United States v. Gila Valley Irr. Dist., Globe Equity No. 59* (D. Ariz. 1935) (the "*Globe Equity Decree*").

6. Granting the motions for summary judgment filed by GRIC, SCAT, Safford, GVID and FID jointly, SCIDD, Phelps Dodge, and ASARCO to the extent that these motions seek a determination that preclusive effect of the *Globe Equity Decree is* applicable to the parties consistent with the findings and conclusions set forth in this court's Amended Order dated February 20, 2002, that was entered in Contested Case No. W1-203.

7. Denying ASARCO's Motion for Summary Judgment on the issue of whether ASARCO's water right relating to the San Carlos River, decreed to ASARCO's predecessor

in interest in the *Globe Equity Decree*, precludes SCAT from claiming a water right to the San Carlos River in the Gila River Adjudication. Genuine disputes regarding material facts preclude granting summary judgment on the claims to the San Carlos River asserted in the Gila River Adjudication by ASARCO and SCAT.

8. Denying the Motion for GVID and FID to Strike SCAT's Notice of Errata and "Corrected" Statement of Facts.

IT IS FURTHER ORDERED the Arizona Department of Water Resources shall prepare subsequent hydrographic survey reports in accordance with the determinations made in this Order.

s/ Eddward P. Ballinger, Jr.
The Honorable Eddward P. Ballinger, Jr.
Judge of the Superior Court

APPENDIX D — AMENDED ORDER OF THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA DATED AND FILED MARCH 7, 2002

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

W-1 (Salt)
W-2 (Verde)
W-3 (Upper Gila)
W-4 (San Pedro)
Consolidated

Contested Case Nos.
W-1-203 (Docket No. 118-119, 202, 206, 209-214 and 224-225)

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE

AMENDED ORDER

The Order dated February 20, 2002 is amended, *nunc pro tunc*, to provide as follows:

Hearings were held on November 27 and 28, 2001, on the requests for summary disposition pending in the above-referenced dockets. These motions were filed by the Gila Valley Irrigation District ("GVID"), Franklin Irrigation District ("FID"), San Carlos Irrigation and Drainage District ("SCIDD"), Salt River Project ("SRP"), the City of Tempe

("Tempe"), the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Tribe (the "Apache Tribes" collectively), ASARCO Incorporated ("ASARCO"), Buckeye Irrigation Company ("Buckeye") and Arlington Canal Company ("Arlington"), and sought relief against the Gila River Indian Community ("GRIC") and the United States (sometimes referred to as the "Government"). These matters were previously referred to Special Master Thorson on February 1, 2000 and July 14, 2000. After permitting oral argument the Special Master filed two reports, which were dated, respectively, June 30, 2000 ("SM June Rep.") and December 28, 2000 ("SM Dec. Rep.") and contained the Special Master's factual findings ("FOF"), legal conclusions ("COL") and recommendations. The Clerk of the Court gave proper notice of the filing of these reports, and the parties were permitted to submit their comments and objections. This court has considered all filed memoranda, arguments of counsel, findings and conclusions of the Special Master, and has otherwise become fully advised as to the issues presented. This Order shall constitute the court's findings of fact and conclusions of law with respect to the pending motions in accordance with Ariz. R. Civ. P. 52.

I. Initial Considerations

A. Scope of Inquiry

Many of the motions presented assert that GRIC's claims are precluded or limited due to operation of legal principles such as *res judicata*, various forms of estoppel (including collateral, statutory, "quasi", equitable, and judicial estoppel), and general principles of contract law. If applicable, these

precepts summarily resolve disputes and, as the Special Master recognized, "when rights to the use of water or dates of appropriation have previously been determined in a prior decree of a court . . . ," this court, "shall accept the determination of such rights and dates of appropriation as found in the prior decree unless such rights have been abandoned." SM June Rep., p.12 (citing Ariz. Rev. Stat. §45-257 (B)(1)). GRIC and the United States point out that proper consideration of these maxims requires that the court consider whether, and when, each principle can be applied to GRIC and/or the Government. If generally applicable, the court must decide if the requisites for successful assertion of each form of preclusion have been met with respect to each motion. But, prior to addressing these issues, the court must address the United States' contention that this court lacks jurisdiction to consider matters previously considered by federal courts.

B. Jurisdiction

Various federal forums have asserted, and in at least one instance continue to exercise, jurisdiction over issues that are the subject of the motions currently before this court. For example, one motion centers on the question of whether the decree relating to rights to water flow from the upper mainstem of the Gila River that was entered in *United States v. Gila Valley Irr. Dist.*, Globe Equity No. 59 (D. Ariz. 1935) (the "*Globe Equity Decree*" or the "*Decree*") triggers issue and/or claim preclusion with respect to claims of GRIC and the Government in this adjudication. Because the federal district court retained exclusive jurisdiction to interpret and enforce the *Globe Equity Decree*, the United States argues that any review of the *Decree's* terms would necessarily be

interpretive, and thus outside the scope of this court's jurisdiction. This argument rests primarily on the Government's interpretation of the Ninth Circuit Court of Appeals' holding in *United States v. Alpine Land & Reservoir Company*, 174 F.3d 1007 (9th Cir. 1999). In *Alpine*, the court of appeals upheld the continuing and exclusive jurisdiction of a federal district court to interpret and apply provisions contained in previously issued decrees. The court held federal jurisdiction to be exclusive based both on the explicit language contained in the decrees and, more importantly, on the fact that the rights declared in the decrees were determined in what were, in effect, *in rem* proceedings:

> The reason why exclusivity is inferred is that it would make no sense for the district court to retain jurisdiction to interpret and apply its own judgment to the future conduct contemplated by the judgment, yet have a state court construing what the federal court meant in the judgment. Such and arrangement would potentially frustrate the federal district court's purpose.

Alpine, 174 F.3d 1013 (citing *Flanagan v. Arnaiz*, 143 F.3d 540, 545 (9th Cir. 1998)).

While acknowledging the principles upon which the *Alpine* decision rests, this court does not believe they apply to this adjudication. The United States fails to distinguish situations in which a state court recognizes the validity and preclusive effect of judgments as opposed to instances in which it purports to interpret or enforce these edicts. That the former undertaking is permitted is not subject to question.

Appendix D

The decision of the United States Supreme Court in *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 118 S. Ct. 921 (1998), authorizes state courts to consider and rule on the extent of issue and claim preclusion that accompanies federal judgments. Justice Ginsburg wrote "[C]laim preclusion by reason of a prior federal judgment is a . . . defensive plea. . . . Such a defense is properly made in the state proceedings, and the state courts' disposition of it is subject to [The Supreme] Court's ultimate review." 522 U.S. 478, 118 S. Ct. 926.

Adopting the Government's view of jurisdiction could result in this court ignoring binding resolutions regarding issues arising in this adjudication, thereby permitting awards of water rights that are in conflict with these determinations. For these reasons, the court concludes that principles of issue and claim preclusion do not cause this court to invade the exclusive jurisdiction of the federal courts. When properly applied, acknowledging the binding effect of prior decrees promotes judicial economy and assists the court in complying with state and federal law mandates.

II. Resolution of Pending Motions

The history relating how the motions before the court arose is accurately and adequately described in Special Master Thorson's reports, portions of which are incorporated as part of this Order.

Appendix D

A. Motions concerning the preclusive effect of the Globe Equity Decree

[Docket Nos. 118 and 119]

Asserting various theories, GVID, FID, SCIDD, SRP[1], Tempe, and the Apache Tribes have each filed motions claiming that the *Globe Equity Decree* limits[2] water rights asserted by, or on behalf of, GRIC.

The *Globe Equity Decree* concluded litigation initiated by the United States for the benefit of, among others, Indian tribes living on the Gila River Indian Reservation. A number of the current movants (or their predecessors in interest) were defendants in the case, There is no dispute that the *Decree* purported to resolve approximately three thousand water right diversions. The Special Master characterized the *Decree* as a lengthy, convoluted edict that has spawned numerous federal court actions relating to administration and interpretation of its terms.

As already noted, Ariz. Rev. Stat. §45-257 requires that this court generally accept prior judicial determinations as to the right to use water. Movants argue that this statute and the doctrine of *res judicata* each requires that the court recognize that the *Globe Equity Decree* "resolved all claims of the United States, as trustee for the Indians of the Gila

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1. "SRP" also refers to the Salt River Valley Water Users' Association.

2. Additional parties joined in this and other motions addressed in this Order.

River Indian Reservation, to water from the Gila River for use on the Gila River Indian Reservation."[3] SM June Rep., p.12. GRIC and the United States argue that the law does not permit the Decree to serve as the basis for a *res judicata* bar, that the elements necessary for this affirmative defense are not present, and that, in any event, disputes regarding material facts preclude summary disposition.[4]

"Simply put, the doctrine of res judicata provides that when a final judgement has been entered on the merits of a

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3. The motions seek to limit claims relating both to the fifty thousand acres of reservation land for which water rights were explicitly recognized in the Decree ("Allotted Lands") and to the three hundred twenty-five thousand acres located within the reservation for which the Globe Equity Decree did not make any provision ("Surplus Lands").

4. GRIC argues at length that summary judgment is never appropriate if there is "the slightest doubt" as to any disputed fact or "any doubt as to whether there are issues of fact to be litigated under any theory of liability advanced." GRIC Objections to SM June Rep., p. 4. GRIC relies on outdated authority that describes a superceded standard governing when summary adjudication is appropriate. This court will abide by the standard adopted by the Arizona Supreme Court in *Orme School v. Reeves*, 166 Ariz. 301, 802 P. 2d 1000 (1990), in *Orme*, the Supreme Court recognized that when considering summary judgment requests, trial courts are not to "pass on the credibility of witnesses with differing versions of material facts . . . weigh the quality of documentary or other evidence . . . [or] choose among competing or conflicting inferences." 166 Ariz. 311, 802 P. 2d 1010. But if a viable motion is presented, summary judgment is to be granted if the opposing party does not come forward with evidence that would permit a reasonable jury to find, directly or by inference, against the movant.

case, '[i]t is a finality as to the claim or demand in controversy, concluding parities and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'" *Nevada v. United* States, 463 U.S. 110, 129-130, 103 S. Ct. 2906, 2918 (1983) (citing *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 S. Ct. 195, 196 (1877)). Generally, for *res judicata* to apply two requirements must be met: 1. The "cause of action" currently before the court must be the same as that asserted in a prior proceeding, and 2. If it is, the court must determine whether the parties to the current action are identical or in privity with those in the former action.[5]

GRIC and the Government also urge that issue and claim preclusion are not applicable to consent judgments such as *Globe Equity Decree* because disputed matters were not resolved by a decision rendered at the conclusion of an evidentiary hearing. Both those supporting and challenging this assertion rely primarily on the United States Supreme Court's decision in *Arizona v. California*, 530 U.S. 392, 120 S. Ct. 2304 (2000) ("*Arizona III*") and the authorities cited therein. For example, the United States asserts that, "In the case of a judgment by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of

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5. The Special Master correctly concluded that here these determinations are to made by applying federal law, both because of the strong federal interest in litigation such as that giving rise to the Decree and because of Arizona courts' recognition that the law of the jurisdiction from which a judgment arose should be used when evaluating preclusion issues.

[Restatement (Second) of Judgments § 27[6] (1982)] does not apply with respect to any issue in a subsequent action." United States Exceptions/Objections to SM June Rep., p. 5 (emphasis omitted) (citing *Arizona III*, 530 U.S. 414, 120 S. Ct. 2319).

Those seeking summary disposition cite *Arizona III* for the proposition that consent judgments are treated just like any other judgments for preclusion purposes. GVID's and FID's Response to GRIC's Objections to SM June Rep., p. 3 (quoting *Arizona III*'s holding that "[c]onsent judgments ordinarily support claim preclusion . . ." *Id.*).[7]

The confusion present in these competing citations arises due to 1. The parties' attempts to apply rules relating to issue preclusion when considering claim preclusion (and vice versa), and 2. The fact that decisions of the United States Supreme Court indicate that claim preclusion is to be applied more liberally in cases fairly characterized as general water adjudications.

The dispute regarding whether consent judgments can serve as the basis for claim preclusion is easily resolved by reference to the Supreme Court's analysis in *Nevada* and

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6. The opinion refers to this section of the Restatement as providing the "general rule that *issue* preclusion attaches only '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgement, and the determination is essential to the judgment'." (emphasis added) 530 U.S. 414, 120 S. Ct. 2319. The significance of this distinction is discussed *infra*.

7. See also *Suttle v. Seely*, 94 Ariz. 161, 382 P.2d 570 (1963).

Arizona *III*. In both opinions the Court recognized the distinction between the claim preclusion effect of *res judicata* versus the issue preclusion that is a consequence of successful assertion of collateral estoppel. In *Nevada*, the Court recognized that "final judgment puts an end to the cause of action, which cannot be brought into litigation between the parties upon any ground whatsoever." 463 U.S. 130, 103 S. Ct. 2918.[8] The *Nevada* court held that *res judicata* was an effective bar to a government water right claim even though the relevant prior decree was rendered when "[t]he district court entered a final decree adopting [a settlement] agreement. . . ." 469 U.S. 118, 103 S. Ct. 2912.

Justice Ginsburg's opinion in *Arizona III* also supports the conclusion that consent decrees can preclude parties from relitigating claims. *Arizona III* dealt, in part, with the question of whether a 1983 consent judgment of the United States Claims Court ("Claims Court") extinguished unasserted disputed title claims that were at issue in the litigation. The Court, consistent with its reasoning in *Nevada*, recognized that the judgment resulting from the parties' settlement, "indeed had, and was intended to have, *claim-preclusive* effect [b]ut settlements ordinarily occasion no *issue preclusion* (sometimes called collateral estoppel), unless it is clear . . . the parties intended their agreement to have such an effect." 530 U.S. 414, 120 S. Ct. 2319 (emphasis in

8. The footnote reference to this quotation explains the difference between the doctrines at issue here: "The corollary preclusion doctrine to res judicata is collateral estoppel. While the latter may be used to bar a broader class of litigants, it can be used only to prevent 'relitigation of issues actually litigated' in a prior lawsuit. *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322, 326, n. 5 (1979)." 463 U.S. 130, 103 S. Ct. 2918, n. 11.

opinion). With respect to *res judicata*, *Arizona III* and *Nevada* demonstrate that decrees entered by stipulation are to be treated as any other judgments.

As to the question of whether *Globe Equity* involved the same "cause of action" asserted by and on behalf of GRIC in this adjudication, the Supreme Court's opinion in *Nevada* again provides guidance. In determining that the causes before the federal district court were the same, Justice Rehnquist looked primarily at three factors contained within the record: 1. The relief sought in the pleading filed in the original action, 2. The language of the decree that concluded that litigation, and 3. The relief sought in the second case.[9]

The facts in *Nevada* dealt with what is referred to as the *Orr Ditch* case, in which the United States brought suit, in 1913, to adjudicate water rights to the Truckee River on behalf of both the Pyramid Lake Indian Reservation ("PLR") and the proposed Newlands Reclamation Project. A final decree was entered, in accordance with a settlement among the parties, more than thirty years after the case was filed. The United States acquired some water rights for PLR under

9. Adopting the analytical method outlined in *Nevada* also permits the court to avoid review of the secondary sources considered by the Special Master, an undertaking to which GRIC objects. To support his legal conclusions regarding preclusion, the Special Master made findings of fact regarding a number of materials (*e.g.* letters authored by individuals involved in *Globe Equity*). SM June Rep., pp. 34-41; Findings of Fact ("FOF") nos. 10, 18, 19, 20, 21, 26, and 28. While review of these documents was consistent with the methods employed in *Nevada*, the court notes Its resolution of the motions relating to the *Decree* did not require consideration of these secondary materials.

this judgment, but failed to obtain any allotment of unaided river flows to permit the Indians to maintain an important fishery. For this reason, the Government filed a second action, almost thirty years after the prior decree was entered, seeking a right to water sufficient to permit maintenance of a natural spawning ground on PLR land lying within the lower reaches of the Truckee River. This claim was barred because the federal district court upheld defendants' *res judicata* affirmative defense. The court of appeals affirmed this part of the district court's decision. *United States v. Truckee-Carson Irr. Dist.*, 649 F.2d 1286 (9th Cir. 1981), modified, 666 F.2d 351 (1982),

Speaking for a unanimous Supreme Court, Justice Rehnquist evaluated the "cause of action" issue by referring to the Government's intention in initiating and the relief requested, in the original action, The amended complaint averred that:

> Until the several rights of the various claimants . . . including the United States, to the use of the waters flowing in said river and its said tributaries in Nevada or used in Nevada have been settled, and the extent, nature, and order in time of each right to divert said waters from said river and its tributaries has been judicially determined the United States cannot properly protect its rights in and to the said waters, and to protect said rights otherwise than as herein sought if they could be protected would necessitate a multiplicity of suits.

* * *

Appendix D

> [t]he United States, having for a long time previous [to 1859] recognized the fact that certain Pah Ûte and other Indians were . . . residing upon and using certain lands [in and around the Truckee River Valley and Pyramid Lake], . . . and being desirous of protecting said Indians and their descendants ... and their use of said lands and waters . . . did reserve said lands from any and all forms of entry or sale and for the sole use of said Indians, and for their benefit and civilization . . . did . . . reserve from further appropriation, appropriate and set aside for its own use in, on, and about said Indian reservation, and the land thereof, from and of the waters of the said Truckee River, five hundred (500) cubic feet of water per second of time. (citations to the record omitted).

463 U.S. 132-133, 103 S. Ct. 2919-2920 (emphasis in opinion).

The Court held that the language of the Government's amended complaint evidenced that it intended to, and was given the opportunity to, assert all of PLR's water right claims, including those implied by law under the doctrine announced in *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207 (1908). Justice Rehnquist looked no further than the language of the decree entered in *Orr Ditch* to conclude that the United States succeeded in accomplishing its intended task stated in the amended complaint:

> The final decree in *Orr Ditch* clearly shows that the parties to the settlement agreement and the

> District Court intended to accomplish [the Tribe's water rights]. The decree provided in part:
>
> 'The parties . . . successors in interest . . . in or to the water rights or lands herein mentioned or described, are and *each of them is hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries, or the waters of any of the creeks or streams or other waters hereinbefore mentioned except the rights, specified, determined* and *allowed by this decree . . .*'."

463 U.S. 132, 103 S. Ct. 2919 (citation to record omitted) (emphasis in opinion).

Finally, the Court compared the broad assertion of water rights claimed by the Government in the original litigation and the scope of the *Orr Ditch* decree with the assertions in its second lawsuit. While recognizing that the allegations in the latter action focused more on PLR's reliance on fishing as a basis for a water right, the Court found that the causes of action in the two cases were the same because "it seems quite clear to us that [claimants] are asserting the same reserved right . . . that was asserted in *Orr Ditch*." 463 U.S. 134, 103 S. Ct. 2920.

In the present situation, the amended complaint filed by the Government in *Globe Equity* contains allegations very similar to (and in some respects broader than) those quoted

by the Supreme Court from the *Orr Ditch* record.[10] The *Globe Equity Decree*, just like the *Orr Ditch Decree*, clearly shows that the parties intended the *Decree* to resolve their relative water rights.[11] And there is no dispute that claims to the water

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10. Paragraph 15(a) of the amended complaint filed in *Globe Equity* states in pertinent part:

> (a) Until the rights of the various claimants . . . including the United States, to divert and use the waters flowing in said river within the area above defined, or to store such water above, with the extent, nature, and priority of such rights, have been judicially determined, the United State can not properly protect its rights to said waters; and to protect them otherwise than is herein sought, if they could be so protected, would necessitate a multitude of suits.

Paragraph 7(b) states in pertinent part, "the water rights reserved in connection with the reservation of said land for the Pima Indians are alleged to be the following, to wit: So much of the waters of the Gila River as should be needed to carry out the purposes of the United States in recognizing and in making said reservation of lands, and also in accomplishing the civilization and bringing about the prosperity of said Indians."

The court Is aware that those opposing summary adjudication differentiate the allegations and prayers for relief in *Orr Ditch* and *Globe Equity by* pointing out that *Orr Ditch* dealt with an adjudication of *all* those known to claim rights to water from the Truckee River *and* its tributaries while the scope of the *Globe Equity Decree* was more limited. These objections are addressed *infra*.

11. Article XIII of the *Globe Equity Decree* provides in pertinent part: (Cont'd)

source that was the subject of the *Globe Equity Decree* have been filed both by and on behalf of GRIC in this adjudication. The broad assertion of water rights in *Globe Equity*, when coupled with the other factors explained above, establishes that the portion of GRIC water claims in this adjudication that relates to the segment of the Gila River previously addressed by the federal district court constitutes the same cause of action resolved by the *Globe Equity Decree.*

Two arguments made by and on behalf of GRIC deserve special mention. First, the assertion that *Globe Equity* was not a comprehensive enough proceeding to support application of *res judicata.* Even GRIC acknowledges that *Globe Equity* involved, "a very complicated water rights litigation, involving thousands of parties and hundreds of thousands of acres of land, evolving over ten years. . . ." GRIC Objections, p. 11. The record reflects that the Government's amended complaint in Globe *Equity* sought to determine the rights to all those known to have water claims to the portion of the Gila River at issue. The water rights addressed in the *Decree* were the same rights described in paragraph 15 of the amended complaint filed in *Globe Equity. As* explained in the SM June Rep., the scope of the undertaking in *Globe Equity* was more than sufficient to permit the resulting decree to have a preclusive effect.

(Cont'd)

> [E]ach and all of the parties . . . and successors in interest . . . are hereby forever enjoined and restrained from asserting or claiming — as against any of the parties herein—. . .any right, title, or interest in or to the waters of the Gila River, or any thereof, except the rights specified, determined and allowed by this decree. . . .

See United States v. District Ct., County of Eagle, Colo., 401 U.S. 520, 523, 91 S. Ct. 998 (1971).

Second, in its filed objections, GRIC agrees that *res judicata* may be applicable in this adjudication, but that it is limited to "the cause of action" asserted in *Globe Equity*. GRIC Objections, p.19. GRIC wants the court to limit the scope of the *Decree's* preclusive effect to the Allotted Lands for which the Government obtained water rights. As the United States did not seek to protect water rights for GRIC's Surplus Lands, which constitute the vast majority of reservation realty, GRIC logically believes it should not be prejudiced for the Government's failure. This argument is best characterized as an assertion that the Government split its claim in *Globe Equity*, a procedure that movants claim is not permitted, but which the *Nevada* opinion suggests may be permitted.[12] This court sympathizes with GRIC's belief that the United States did not adequately represent its interests in *Globe Equity*, but the amended complaint filed in that litigation does not support GRIC's claim that anything less than its entire water right was put at issue by the Government. This court is bound to abide by the framework for applying preclusion that was employed by the United States Supreme Court in *Nevada*. In that case, the Court affirmed the principle that "after the United States on behalf of its wards . . . invoke[s] the jurisdiction of its courts . . . wards should [not] themselves be permitted to relitigate. . . ."[13] 463 U.S. 135, 103 S. Ct. 2921.

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12. *See* 463 U.S. 134, 103 S. a 2920, n. 13

13. The Supreme Court recognized the consequences its ruling visited upon Indians represented by the Government. ("We, of course,

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However, the record also establishes that the Government intended to limit the water rights asserted in *Globe Equity* to those flowing within that portion of the river system described in paragraph 15 of the amended complaint. The request for relief in this paragraph is distinguishable from that considered in *Nevada*, in that the *Orr Ditch* proceeding involved a situation in which river tributaries were included both in the claim for relief and the final judgment. Such is not the case in this adjudication. The Government's amended complaint in *Globe Equity* and the *Decree* establish that only water rights to flow from the mainstem of the Gila River were adjudicated by the federal district court.

Having determined that this adjudication, in part, involves the same cause of action that was asserted in *Globe Equity*, the court must decide which of the parties are bound by, or may benefit from, the effect of preclusion by judgment. The *Nevada* decision makes it clear that the United States, GRIC, SCIDD, FID, and GVID, and those in privity with them, may assert claim preclusion because their interests were represented in *Globe Equity*.[14] The more difficult question

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do not pass judgment on the quality of the representation that the Tribe received. In 1951 the Tribe sued the Government before the Indian Claims Commission for damages, basing its claim of liability on the Tribe's receipt of less water for the fishery than it was entitled to.") 463 U.S. 135, 103 S. Ct. 2921, n.14. *See* n. 18, *infra.*

14. GRIC objects to SCIDD's assertion of *res judicata* because the Government represented both parties in *Globe Equity*. GRIC claims this representation shows there was a lack of adversity

(Cont'd)

concerns the extent to which subsequent water claimants who were not parties to *Globe Equity* (or a party's privy or successor) can assert preclusion. The Special Master Thorson

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between GRIC and SCIDD that prevents claim preclusion from being applied. The Supreme Court has rejected this argument. The principle urged here by GRIC does not apply to water adjudications:

> A strict adversity requirement does not necessarily fit the realities of water adjudications. All parties' water rights are interdependent. . . . Stability in water rights therefore requires that all parties be bound in all combinations. Further, in many water adjudications there is no actual controversy between the parties; the proceedings may serve primarily an administrative purpose. . . .
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> * * *
>
> [And] . . . where Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, and has even authorized the inclusion of reservation land within a project, the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests.

(citations omitted). 463 U.S. 139, 143, 103 S. Ct. 2922-2923, 2924.

The Court went on to hold that in circumstances in which a water adjudication addresses claims by the Government on behalf of an Indian tribe, a reclamation project, and a large number of other claims, "It is unnecessary to decide whether there would be adversity of interests between the Tribe, on the one hand, and the settlers and [the project], on the other. . . ." 463 U.S. 143, 103 S. Ct. 2924.

found that *res judicata* could not benefit this class of litigants so he attempted to resolve the matter by determining whether the facts and applicable law would justify applying collateral estoppel principles. He noted that none of the movants had asserted a collateral estoppel argument, but he considered the scope of *Globe Equity's* reach within the framework of preclusion because issues present in this proceeding were actually in dispute (*e.g.*, entitlements for Allotted Lands) in *Globe Equity.* For that reason, the Special Master concluded the parties could be deemed to have intended for those disputed claims resolved by the *Globe Equity Decree.*

The court respectfully disagrees with the Special Master's analysis for two reasons. First, on the record before it, the court cannot find that issue preclusion applies. The *Globe Equity Decree* arose from a settlement. The district court did not enter a decision after considering arguments and evidence submitted by the parties. For the court to rule that collateral estoppel applies at this juncture would require a finding that the stipulated judgment entered in *Globe Equity* was clearly intended by the parties to preclude further consideration of the issues involved. *Arizona III*, 530 U.S. 414, 120 S. Ct. 2319. The record does not support entry of summary judgment on this issue.

The more important reason to reject issue preclusion is because controlling United States Supreme Court authority renders it moot with respect to the *Globe Equity Decree.* In *Nevada*, the Court eliminated the *res judicata* doctrine's mutuality requirement in instances in which the initial litigation giving rise to a claim preclusion defense can be fairly characterized as a comprehensive water rights

adjudication. In resolving the issue in *Nevada*, the Court characterized the treatment of subsequent water claimants who were not parties to the *Orr Ditch* decree as a "difficult question" and conceded that "mutuality . . . has remained a part of the doctrine of *res judicata*." 463 U.S. 143, 120 S. Ct. 2925 (citations omitted). Nevertheless, because the *Orr Ditch* decree resulted from a comprehensive determination of water rights that subsequent appropriators had relied on for years, the Court held it would be manifestly unjust not to apply *res judicata* principles. This holding establishes an exception to mutuality that applies when claim preclusion is asserted in a water case.

Case law and the record confirm there is no genuine dispute that *Globe Equity* was an adjudication comprehensive enough to fulfill the first prong of the Supreme Court's mutuality exception. *See United States v. District Court*, 401 U.S. 520, 91 S. Ct. 998 (1971); GRIC's Objection, p. 11. Satisfying the second requisite turns on whether this court can determine that there has been sufficient reliance on the *Globe Equity Decree*. In *Nevada*, the United States Supreme Court, without reference to the record, held that "[n]onparties such as subsequent appropriators in this case have relied just as much on the *Orr Ditch* decree in participating in the development of western Nevada as have the parties. . . ." 463 U.S. 144, 120 S. Ct. 2925. In its *Orr Ditch* opinion, the Ninth Circuit Court of Appeals held that the *Orr Ditch* decree, which contains relevant language similar to that found in the *Globe Equity Decree*, evidenced that, "clearly, the government intended to enable [subsequent appropriator] reliance when it consented to entry of the final decree." *United* States v. *Truckee-Carson Irr. Dist.*, 649 F.2d 1286,

1308, (1981). Nothing in either the Supreme Court's or court of appeals analysis suggests that determinations regarding mutuality were based upon evidentiary presentations at the trial level. To the contrary, Justice Rehnquist's reference to subsequent appropriators as among those who may rely on a water rights decree supports the view that common knowledge of the vast development in western states over the past decades may, in some cases, support use of the Court's *res judicata* mutuality exception.

In this adjudication, the court is fortunate to have guidance as to how to resolve the reliance issue. Among the questions faced by the Arizona Supreme Court in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 175 Ariz. 382, 857 P.2d 1236 (1993), was whether the court should revisit water law principles it had established more than seventy years earlier in *Maricopa County Municipal Water Conservation District No. One v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P.2d 369 (1931) *modified*, 39 Ariz. 367, 7 P.2d 254 (1932). The court refused to reconsider its prior water law edicts even though it recognized that rules it had pronounced, "may [have been] based on an understanding of hydrology less precise than current theories . . ." 175 Ariz. 389, 857 P.2d 1243.

What is relevant to consideration of the current motions is the court's stated reason for its decision: the belief that it would be fundamentally unjust to address anew rules relating to water entitlements decades after the state's water users had acted in reliance upon the court's prior determinations. This reasoning applies with equal force to the social and economic development following entry of the judgment in

Globe Equity.[15] The Arizona Supreme Court's recognition of this state's dramatic economic expansion, coupled with generally known facts relating to Arizona's evolution during the past sixty-seven years, justifies this court taking judicial notice of reliance on the *Globe Equity Decree* by subsequent appropriators, sufficient to satisfy the mutuality exception carved out in *Nevada.*[16]

Because this adjudication is equitable in nature, evaluating the consequences of this court's rulings is

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15. Chief Justice Feldman's opinion reflects the court's intention to apply finality to water right decisions even to those for whom preclusion would be generally unavailable:

> We perceive our role as interpreting *Southwest Cotton*, not refining, revising, correcting, or improving it. We believe it is too late to change or overrule the case. More than six decades have passed since *Southwest Cotton* was decided. The Arizona legislature has erected statutory frameworks for regulating surface water and groundwater based on *Southwest Cotton.* Arizona's agricultural, industrial, mining, and urban interests have accommodated themselves to those frameworks. *Southwest Cotton* has been part of the constant backdrop for vast investments, the founding and growth of towns and cities, and the lives of our people.

175 Ariz. 389, 857 P.2d 1243.

16. One of the U. S. Supreme Court's decisions in *Arizona v. California* also supports the view that little, if any, specific reliance must be shown to trigger the mutuality exception in water adjudications: "even the absence of detrimental reliance cannot open an otherwise final determination of a fully litigated issue."

460 U.S. 605, 626, 103 S. Ct. 1382, 1395 (1983) ("*Arizona II*").

appropriate. Here, the Government, as GRIC's guardian and trustee, put at issue all of the Tribe's water rights, but sought an award for less than fifteen percent of land within the Gila River Indian Reservation. As was the case in *Orr Ditch*, a legitimate question is raised about the quality of representation the Tribe received. This concern also arose in *Arizona II*. The facts in that case provide as strong an argument for not applying claim preclusion as those present here. Justice Brennan's dissent in *Arizona II* pointed out that "[t]he United States completely failed to present evidence regarding [water claims] . . ." thereby causing the relevant Indian tribes to suffer "a manifest injustice." 460 U.S. 643, 648, 103 S. Ct. 1404, 1406. In *Arizona II*, *Nevada*, and this case, it may be true that Indian tribes "bear the cost of the United State's error." 460 U.S. 649, 103 S. Ct. 1407. But controlling Supreme Court authority dictates that those presiding over water adjudications apply claim preclusion liberally to final judgments rendered in prior comprehensive proceedings. Any resulting harm visited upon Indian tribes as a result of this mandate must continue to be addressed in other forums.[17]

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17. The Special Masters' reports describe how relief can be had. In 1946, the Indian Claims Commission Act of August 13, 1946, (ch. 959, 60 Stat. 1049-1056, 25 U.S.C. § 70) was enacted to permit Indian tribes "to assert monetary claims against the federal government, otherwise barred by sovereign immunity, arising before passage of the act in 1946 and based on treaty or contractual violations, legal and equitable claims, land confiscation, and other claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." SM Dec. Rep., pp.8 & 9, n. 2 (citations omitted). As discussed *infra*, GRIC has sought reparation under the Act. See *Gila River Pima-Maricopa Indian Community v. United States*, 2 Cl. Ct. 12 (1982).

None of the other matters raised by the parties, such as legally significant "changed circumstances" or consideration of what is referred to by the parties as the 1924 Landowners' Agreement, affect the results required with respect to the motions brought in these dockets. Accordingly,

IT IS ORDERED GRANTING movants' motions for summary judgment. In this adjudication, neither GRIC nor the United States on behalf of GRIC shall be entitled to claim water rights relating to the mainstem of the Gila River, including flow from the San Carlos River, except to the extent such rights were granted to them by the *Globe Equity Decree*.

B. SCIDD's motion relating to the Florence-Casa Grande Landowners' Agreement, San Carlos Irrigation Project Landowners' Agreement, and the Project Payment Agreement

[Docket No. 206]

After reviewing the record and considering the positions of the interested parties, the court determines that the above-referenced motion is moot as a result of the February 9, 2000, decision of the federal district court in *Globe Equity*. For this reason,

IT IS FURTHER ORDERED DENYING SCIDD's motion for summary judgment.

C. ASARCO'S motions asserting that GRIC's water rights are subject to a Water Rights

Appendix D

Settlement and Exchange Agreement and Consent to Assignment

[Docket No. 202]

With one minor exception, the court agrees with the Special Master's factual findings and legal conclusions relating to ASARCO's motion. The determination as to whether or not GRIC and ASARCO's adjudicated water right abstracts should be annotated to refer to the contractual agreements between these parties need not be decided at this time. The remainder of the SM June Rep. concerning this motion is adopted by this reference.[18] Based upon the foregoing,

IT IS ORDERED DENYING ASARCO's motion for summary judgment.

D. Motion for determination that water claims of GRIC and/or the Government are limited by the judgment entered *in Gila River Pima-Maricopa Indian Community v. United States*, *Docket No. 236-D*

[Docket Nos. 213 and 214]

SRP and Tempe request a ruling that neither GRIC nor the Government can lawfully assert a right to water in the Salt River system except with respect to those rights attributable to a parcel of land situated in the northwest corner

18. Specifically, Section VI, FOF Nos. 38-40 and COL No.38.

of the Gila River Indian Reservation. Movants believe they are entitled to relief due to the effect of the Claims Court's decision in *Gila River Pima-Maricopa Indian Community v. United States*, which was affirmed, in part, by the Court of Appeals for the Federal Circuit. 695 F.2d 559 (1982) ("Gila *236").* SRP and Tempe claim *Gila 236* represents a binding determination that GRIC possesses only a very limited right to use water originating from the Salt River system.

GRIC and the Government, the only parties to *Gila 236*, posit two objections to the motion: 1. Decisions such as *Gila 236* are not to be given preclusive effect, and 2. Movants have not satisfied the requisites for preclusion.

The circumstances giving rise to issuance of the *Gila 236* decision are adequately discussed in SM Dec. Rep., pp. 49-53. For purposes of this Order, the following are the most relevant, undisputed facts:

- In 1951, GRIC filed an action against the United States pursuant to the Indian Claims Commission Act seeking awards relating to a number of disputes. One of these disputes, designated "Docket 236-D," dealt with the Tribe's claim for compensation for Salt River water that should have been put to use on the GRIC reservation, but was used for other purposes.

- One phase of the litigation dealt with the extent of GRIC's Salt River water rights and specifically addressed GRIC's claim that it was entitled, "to the waters of the Salt River to irrigate 113,498 acres of land on the Gila River Indian

Reservation, representing all the practicably irrigable land on the reservation." 695 F.2d 561.

- *Gila 236* held that GRIC's Salt River water right claims were limited to 1,490 acres situated in the northwest corner of the reservation (hereinafter the "Maricopa Colony"):

> [T]he court must resolve whether in creating and enlarging the Gila River Indian Reservation the United States reserved water from the Salt River for the irrigation of reservation lands. The weight of the credible evidence clearly leads to a negative answer except for the . . . [Maricopa Colony])

695 F.2d 561.

- Approximately seventeen years after the *Gila 236* decision became final, GRIC and the United States resolved the remaining issues in the case by a stipulated judgment.

Movants believe GRIC and the Government are collaterally estopped from arguing positions inconsistent with the holdings in *Gila 236*. The most important prerequisite for asserting collateral estoppel — that an identical issue was actually and necessarily decided in an earlier case is clearly present here. The *Gila 236* decision directly addressed and unambiguously declared the land for which GRIC may claim Salt River water rights.[19] Despite this fact, GRIC and the

19. GRIC disagrees claiming that "[t]he right of an Indian Tribe to have been treated fairly and honorable [sic] by its trustee . . . is distinct, different and separate from the right of the Indian tribe to

(Cont'd)

Government argue that collateral estoppel does not apply to consent judgments such as that stipulated to in *Gila 236*.[20] But abundant authority supports the general proposition that they do. More importantly, in *Gila 236*, the Claims Court rendered its decision after the issue of GRIC's Salt River water rights was litigated by two adverse parties. It was this decision, which was contested on appeal, that is the basis for collateral estoppel here. The fact that more than a decade after the *Gila 236* decision resolved the parties' liability dispute, GRIC and the Government decided to settle the issue of damages is of no consequence. *See United States v. Pend Oreille Public Utility Dist.* No 1, 926 F.2d 1502 (9th Cir. 1991) (court of appeals applied preclusion to a resolution by the Indian Claims Commission involving the determination of liability by way of contested litigation, although damages were later resolved of by stipulated settlement) Collateral estoppel prevents GRIC from successfully asserting water rights that are inconsistent with the *Gila 236* decision.

The United States insists that even if otherwise pertinent, issue preclusion may not be used in this proceeding to limit

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have its *Winters*, aboriginal, and prior appropriation rights quantified, as against other claimants, for future application and enforcement." GRIC Objections, p. 15. For purposes of the current motion, the court is only focused on the issues of whether, and to what extent, GRIC may claim any water rights in the Salt River system. This issue was squarely before the Claims Court and the U.S. Court of Appeals for the Federal Circuit in *Gila 236*.

20. The Court has considered and rejected GRIC's claim that Claims Court decisions cannot generally support preclusion after reviewing the case law cited by the parties and the Special Master.

Government water claims. This argument is based upon the U.S. Supreme Court's opinion in *United States v. Mendoza,* 464 U.S. 154, 104 S. Ct. 568 (1984), in which the Court held that mutuality is required when attempting to apply collateral estoppel against the Government. This additional requirement for issue preclusion was recognized because of the Supreme Court's belief that: 1. Absent such a rule, development of important legal principles would be thwarted by premature finality, 2. Successive federal administrations would be bound to positions they do not support, and 3. The Government would be forced to appeal cases of limited legal significance.

In his report, Special Master Thorson recognized the rules laid out in *Mendoza*, but found them to be inapplicable to this case. He believed there is an exception to the *Mendoza* rule similar in nature and scope to that recognized in *Nevada* for *res judicata*. Movants urge adoption of the Special Master's decision by arguing that *Mendoza* is limited to its facts, and subsequent cases have indicated that nonmutual collateral estoppel may be raised against the United States in some instances.

The rule announced in *Mendoza* exists as a pronouncement of the nation's highest court that "nonmutual offensive collateral estoppel is not to be extended to the United States". 464 U.S. 158, 104 S. Ct. 571. Of course, in this instance both GRIC and the Government, albeit not adverse, are parties, and *Mendoza* made clear that "[t]he concerns underlying our disapproval of collateral estoppel against the government are for the most part inapplicable where mutuality is present. . . ." 464 U.S. 163-164,

104 S. Ct. 574. But lower courts need firm footing when distinguishing unambiguous Supreme Court pronouncements. There may be valid exceptions to the *Mendoza* rule, but the current situation does not present the extent of mutuality sufficient for this proceeding to fall outside of the ambit of *Mendoza.* In addition, the *Gila 236* litigation did not involve the same type of comprehensive resolution of widely-held rights that caused the Supreme Court to carve out an exception to traditional rules of claim preclusion. The rule announced in *Mendoza* prevents movants from prevailing against the Government on a collateral estoppel defense.

The policy considerations that caused the Supreme Court to fashion the *Mendoza* rule do not arise when courts consider whether the integrity of the judicial process requires that the United States be prohibited from taking a position inconsistent with one successfully asserted in a previous action. This evaluation invokes the doctrine of judicial estoppel. The United States does not dispute that it is subject to this type of preclusion, although both the Government and GRIC assert that Arizona law does not permit its use in this case.

The Arizona Supreme Court's most recent application of judicial estoppel appears in *State v. Towery*, 186 Ariz. 168, 920 P.2d 290 (1996). There the court set forth the elements of judicial estoppel by citing to its prior decision in *Standage Ventures, Inc. v. State*, 114 Ariz. 480, 562 P.2d 360 (1977):

> Three requirements must exist before the court can apply judicial estoppel: (1) the parties must

> be the same, (2) the question involved must be the same, and (3) the party asserting the inconsistent position must have been successful in the prior judicial proceeding.

186 Ariz. 182, 920 P.2d 304.

There can be no legitimate dispute that two of the elements listed above are present here. This court has already held that *Gila 236* dealt with an issue identical to one present in this adjudication: GRIC's entitlement to water from the Salt River system. And the record shows that the Government was successful in convincing the Claims Court that water from the Salt River was not generally reserved for the Gila River Indian Reservation. It is only the mutuality component of judicial estoppel that, on first reading, seems to bar this type of preclusion.

Movants argue that the "same parties" portion of Arizona's judicial estoppel test is merely *dictum* and that the Arizona Supreme Court has never refused to apply judicial estoppel due to the absence of mutuality. Review of the history of Arizona's judicial estoppel doctrine supports the claim that this state's supreme court has not addressed substantively the question of whether mutuality is a requisite for applying judicial estoppel.

In *Towery*, the court merely recites the judicial estoppel elements recognized in *Standage*. While the *Standage* court noted that its early decisions referred to a mutuality limitation as part of judicial estoppel (citing *Martin v. Wood*, 71 Ariz. 457, 229 P.2d 710 (1951)), it acknowledged lower appellate

court authority (specifically, *Mecham v. City of Glendale*, 15 Ariz. App. 402, 489 P.2d 65 (1971))[21] holding that mutuality is not necessary. The *Standage* court did not consider this conflict because in the case before it the relevant party had not previously obtained relief based upon an inconsistent position.[22] And its reliance on the *Martin* case is tenuous. To the extent germinated from *Martin*, this state's mutuality requirement rests entirely on: 1. A reference to a general discussion of judicial estoppel found at 31 C.J.S. 19, and 2. The Arizona Supreme Court's 1928 decision in *Rossi v. Hammons*, 34 Ariz. 95, 268 P. 181 (1928). It is noteworthy that in *Rossi*, the party against whom preclusion was found applicable had prevailed in a prior action by arguing that the then plaintiff could not sue because the state

21. The court also cited and quoted from *State Farm Auto. Ins. Co. v. Civil Service Employees Ins. Co.*, 19 Ariz. App. 594, 509 P.2d 725 (App. 1973), a case in which lack of mutuality was not case dispositive and one in which the court recognized the unsettled sate of the mutuality issue. *See* 19 Ariz. App. 599 n. 2.

22. Mutuality was not vital to the decision in *Towery* either. There, estoppel was denied because "judicial estoppel is generally not applied when the first inconsistent position was not a significant factor in the initial proceeding." 186 Ariz. 183, 920 P.2d 305. And while *Towery*, like *Standage*, lists mutuality as an element, it too suggests, at least Implicitly, that judicial estoppel may apply even when the parties in a subsequent action are not identical. ("criminal courts have indicated that judicial estoppel would preclude the state from changing its version of the facts in separate proceedings involving the same matter to protect the defendant's right to due process. See *People v. Gayfield* [Citations omitted] (suggesting that the state would be estopped form inconsistently claiming in separate proceedings that *different defendants* shot the same victim)."

186 Ariz. 182, 920 P.2d 304 (emphasis added)

superintendent of banks held the asserted claim. Preclusion was found when the same defendant attempted to challenge assertion of the same claim in a subsequent suit by the superintendent, who was not a party in the first case.

The decisions discussed above buttress the claim that the Arizona Supreme Court has not yet focused its attention on resolving whether mutuality is a requisite for invoking judicial estoppel. However, the Arizona Court of Appeals has weighed in on the subject. In *Mecham*, the court held that parties in an action could successfully use judicial estoppel even when they were not involved in the prior relevant litigation. It is true, as GRIC and the Government point out, that there are other intermediate Arizona appellate decisions that cite *Towery* and *Standage* and recognize mutuality as a judicial estoppel requisite. *See De Alfy Properties v. Pima County*, 195 Ariz. 37, 985 P.2d 522 (App. 1998). To resolve this conflict, the court has looked to the Arizona Supreme Court's statement regarding the fundamental purpose for this type of preclusion:

> [p]rotecting the integrity of the judicial process is the universally recognized purpose of judicial estoppel.
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> * * *
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> [I]t is not intended to protect individual litigants but is invoked to protect the integrity of the judicial process by preventing a litigant from using the courts to gain an unfair advantage.

Towery, 186 Ariz. 182-183, 920 P.2d 304-305.

Keeping these edicts in mind, the court cannot comprehend how mutuality aids in preventing the wrong judicial estoppel is designed to prevent. To the contrary, such a requirement could aid a party in obtaining an unfair advantage in litigation or blemishing the integrity that is so important to maintaining public confidence in our judicial process. Based on the foregoing,

IT IS ORDERED GRANTING SRP's and Tempe's motions. Both GRIC and the United States shall be prohibited from asserting any claim in this adjudication that is inconsistent with the judgment of the Claims Court in *Gila River Pima-Maricopa Indian Community v. United States*, Docket No. 236-D,

E. Motion for partial summary judgment as to the preclusive effect of the Claims Court's decision *in Gila River Pima-Maricopa Indian* Community v. *United States, Docket No. 228*

[Docket Nos. 209 and 210]

SRP and Tempe also seek an Order summarily holding that the judgment rendered in *Gila River Pima-Maricopa Indian Community v. United States*, Docket No. 228 ("Docket 228")[23] precludes GRIC and the Government from asserting any rights to water other than those recognized in the decrees entered in *Globe Equity* and *United States v. Haggard, No. 19*. This litigation resolved GRIC's claim that the

23. 2 Cl. Ct. 12 (1982). The U.S. Court of Appeals for the Federal Circuit twice considered the Claims Court's award. The final judgment appears at 2 Cl. Ct. 33 (1984).

Government had taken its aboriginal territory without providing just compensation. GRIC prevailed and was awarded more than six million dollars.

Movants assert the award obtained by GRIC in *Docket 228* permits assertion of the legal doctrines of judicial, collateral and "quasi" estoppel to limit GRIC's and the Government's water claims in this case.

Each doctrine asserted has as one of its elements the requirement that issues here be the same as those considered in another proceeding. Movants argue that this requirement is satisfied because as part of the *Docket 228* proceeding GRIC allocated all of its claimed aboriginal water rights in the Gila River system to the confiscated land that gave rise to *Docket 228's* monetary award. This award purportedly prevents GRIC from seeking entitlement to these same water rights in this proceeding. GRIC, the Government and the Special Master distinguish *Docket 228* by characterizing the relevant issue as involving the valuation of land, which only tangentially considered water rights and, therefore, cannot be used to justify preclusion.

In formulating the *Docket 228* judgment, did the Claims Court resolve water right issues present in this adjudication? Answering this question requires an understanding of the scope of each proceeding. This adjudication of claims to the Gila River system focuses on the extent and priority of rights to use water in the river system and its source. The court is required to evaluate competing demands for a scarce commodity — water flowing within the relevant watersheds. Close attention to whether any asserted claim is valid as to

entitlement and priority is vital. How does this undertaking compare with that faced by the Claims Court?

In *Docket 228*, the relevant question was the estimated value, as of November 15, 1883, of land appropriated by the Government. Although carefully and thoroughly studied by the parties and evaluated by the Claims Court, this type of retrospective appraisal unavoidably resulted from a somewhat cursory look at a number of factors (of which water availability is but one) to arrive at an imprecise conclusion.[24] Movants correctly point out that the Claims Court made an award that included agricultural acreage, the amount of which

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24. The Claims Court held:

> Where the fair market value of a large tract of land is to be found at a remote date in the past, without an active, open market, the Commission and the court have considered a variety of factors including evidence of private sales or auction sales, the location and physical characteristics of the land, climate, the type of settlers, the history and development of the area, economic conditions, natural resources . . . and size of the area.
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> * * *
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> The final result is an estimated value, not an actual value. . . . The task in this case is to estimate what a single, hypothetical, well-informed purchaser would have paid a hypothetical, well-informed seller for 3,312,858 acres of Arizona land on November 15, 1883, . . . with a recognition that different tracts in the award area could have different most profitable uses.

2 Cl. Ct. 27, 28-29.

was "determined by the amount of water available for irrigation, not the acreage of arable land . . . ," and that the award relating to agricultural land was "inclusive of water rights." 2 Cl. Ct. 29, 32. But the Claims Court did not consider what specific water rights plaintiffs held, their relative priority, or whether if as of 1883 there were any limits on the Indian tribes' right to stream flow. The court's opinion evidences that neither the Claims Court nor any of the parties focused on quantifying entitlements to stream flows, or other issues relevant to water adjudications. For example, the court held that water availability was the primary factor limiting the amount of land that could be considered as having an agricultural use, but not even plaintiff's hydrology expert considered sufficiently whether it would be appropriate to discount upstream diversions based upon the tribe's prior aboriginal water rights.[25]

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25. The Claims Court held:

> The factor limiting the amount of land in the award area that actually could be used as agricultural land was the availability of water.
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> * * *
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> [P]laintiffs' hydrology expert . . . calculated the Gila River, Santa Cruz River, Salt River, Agua Fria River, Hassayampa River and miscellaneous unmeasured tributaries, in 1883, in the award area had a total virgin flow of 2,271,900 acre-feet. *This was adjusted for upstream depletions (mainly from irrigation farming) calculated to be present in 1883 . . . to derive . . . the virgin flow into the award area.*"). (Emphasis added)

(Cont'd)

Appendix D

The only water related issue that this court can definitely determine was addressed in *Docket* 228 was whether, in valuing the land for which compensation was to be awarded, the Claims Court should assume that adequate water was available for the uses asserted. Because movants have not fulfilled the identical issues element that is requisite to granting the relief they have requested, and because the record reflects genuine disputes as to material facts,

IT IS ORDERED DENYING movants' motion for summary judgment as to the preclusive effect of the Claims Court's decision in *Docket 228.*

F. Motion for judgment as to the effect of the 1903 decree entered in *United States v. Haggard* and the 1936 Maricopa Contract

[Docket Nos. 213 and 214]

The SM June Rep. (pp. 33-35, 45) contains an adequate description of the facts surrounding the decree and contract

(Cont'd)

In addition, this court is unclear as to the weight given to the fact that much of the water flow in 1883 was unregulated. The *Docket 228* opinion Indicates that more than half of water available for irrigation was not utilized because means were not in place to store and regulate flows. Plaintiffs' expert computed hypothetical partial regulated flows, but the Claims Court rejected this analysis and, in any event, did not quantify and declare Indian water rights in order to determine its valuation award.

at issue in this motion. On the current record, even if preclusion doctrines were otherwise applicable, the court agrees with the Special Master's conclusion that the United States Supreme Court's "recognition of the federal reserved water rights doctrine . . . provides a 'rare' but sufficiently changed circumstance to provide an exception under the federal claims preclusion doctrine.[26] Accordingly,

IT IS ORDERED DENYING movants' request for summary judgment as to the preclusive effect of the decree entered in *United States v. Haggard* or the contract between the Government and SRP, approved by the Pima Tribal Council that is referred to in the SM Dec. Rep. as the "Maricopa Contract."

G. Request for judgment regarding the effect of the 1907 Sacaton Agreement between SRP and the United States

[Docket Nos. 211 and 212]

For the most part, SRP's motion concerning the effect of its 1907 hydroelectric power agreement with the United States (the "Sacaton Agreement") is rendered moot by the court's ruling regarding GRIC's ability to assert rights to water from the Salt River. To the extent the motion remains viable, the court incorporates by this reference SM Dec. Rep. FOF Nos. 76-92 and COL Nos. 15, 16, 18, 19, 20 (to the

26. SM Dec. Rep., p.39. Although not discussed in this Order, the court did consider, and reject, GRIC's claim that changed circumstances prevented preclusion principles from applying in connection with motions that were discussed in the SM June Rep.

extent consistent with this Order), and 21. Based on these findings and conclusions, and on the 1992 Claims Court decision in *Gila River Indian Community v. United States* referred to in the SM Dec. Rep. p. 73,

IT IS ORDERED GRANTING SRP's motion. Neither GRIC nor the United States on behalf of GRIC shall be permitted to assert, in this adjudication, a claim that GRIC possesses any interest, ownership, or right to use, the dams, reservoirs, canals or other works owned by SRP that are related to the Sacaton Agreement.

H. Request for judgment regarding the binding effect of the Buckeye-Arlington Agreements.

[Docket Nos. 224 and 225]

Buckeye, Arlington, and others moved for judgment against GRIC and the Government based upon the provisions of two agreements, one entered into by the United States and Arlington, and the other by Buckeye and the Government, and each dated May 29, 1947 (collectively the "Buckeye-Arlington Agreements"). These contracts arose as the result of the settlement among the parties of an action commenced in 1929 that affected interests of GRIC addressed in a proceeding designated as Docket 236-F in the *Gila River Pima-Maricopa Indian Community v. United States* case ("*Gila 236-F*").[27] The request for relief with respect to the Buckeye-Arlington Agreements cannot be granted for two reasons:

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27. The decision of the Claims Court In this case is found at 9 Cl. Ct. 660 (1986).

1. Judicial estoppel does not apply because the record does not establish that any party obtained prior judicial relief by asserting a position that was both a significant factor in obtaining the relief granted and inconsistent with positions taken in this adjudication. *Towery*, 186 Ariz. 168, 920 P.2d 290, and

2. Genuine disputes as to material facts exist that preclude summary adjudication. *See* SM Dec. Rep., pp. 93-95.

Accordingly,

IT IS ORDERED DENYING movants' motion with respect to the Buckeye-Arlington Agreements.

IT IS FURTHER ORDERED the motions of Special Master Thorson for approval of his reports are approved to the extent consistent with this Order.

IT IS FURTHER ORDERED the Arizona Department of Water Resources shall prepare subsequent hydrographic survey reports in accordance with the determinations made in this Order.

s/ Eddward P. Ballinger, Jr.
The Honorable Eddward P. Ballinger, Jr.
Judge of the Superior Court

March 7, 2002

APPENDIX E — REPORT OF THE SPECIAL MASTER OF THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA DATED JUNE 30, 2000

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE

Consolidated

Contested Case No. W1-203

[Table of Contents intentionally omitted]

REPORT OF THE SPECIAL MASTER

Contested Case No. W1-203
In re the Water Rights of the Gila River Indian Community
Motions for Summary Judgment
Heard on April 26, 2000

I. INTRODUCTION

The Pimas and Maricopas of the Gila River Indian Community, perhaps of all American Indian tribes, epitomize the agrarian, pastoral, and civilized communities envisioned when the federal government sought to restrict native people to ever-diminishing reservations. The Pima and Maricopa people were generally cordial and helpful to the Europeans and Americans who entered and settled within their aboriginal

range. Their hospitality was not always returned in kind, as settlers continually encroached on Indian lands and water.

The Pimas and Maricopas of the Gila River Indian Reservation, established by Congress in 1859, had abundant arable lands but the misfortune of a middle-river location that allowed upstream settlers, who moved into the upper valley from Florence to the Duncan-Virden area starting in the 1860s, to easily diminish Gila River flows. Having assumed fiduciary obligations for these Indian people, the United States government undertook a series of initiatives to secure adequate water for the reservation. During the 50 years from 1875 to 1925, the federal government sought to buffer Indian agriculture by additions to the reservation made through a series of seven presidential executive orders (expanding the size of the reservation from 100 to 580 square miles); encouraged Indian groundwater use; authorized and constructed the San Carlos Project, a collection of water storage and distribution facilities (most notably Coolidge Dam and San Carlos Reservoir); and initiated federal court litigation, now widely known as *Globe Equity No. 59*,[1] to settle water rights on the upper mainstem of the Gila River.

For the 65-year period since it was entered in 1935, the *Globe Equity* consent decree has comprised the "law of the Gila River" although the meaning of the legal regime has often been litigated and debated. Although among the principal beneficiaries of the *Globe Equity Decree*, the Gila River Indian Community (GRIC) is not a party to the decree. Indeed, its predecessor, the Pima Indian Tribal Council, was

1. United States v. Gila Valley Irr. Dist., Globe Equity No. 59 (D. Ariz. 1935).

denied the opportunity to intervene and participate in the *Globe Equity* litigation, days before the consent decree was entered. Until 1982, the interests of these Indians in the Gila River were asserted by the United States although the fidelity of federal representation has often been challenged by the Community in other venues. Simply stated, the Community does not believe the *Globe Equity Decree* embodies all of their rights and interests to the Gila River and its tributaries.

Arizona's general stream adjudication has applied another layer of complexity to the upper Gila River and the Community's rights in those waters. The Gila River Indian Community, supported by the United States, believes that additional water rights beyond those established in *Globe Equity* can be claimed and established in the Gila River system through this state court adjudication. Non-Indian claimants assert that the Community's claims to Gila River water are limited by the preclusive effect of the *Globe Equity Decree* and certain contractual obligations entered into by the Community or the United States in its behalf. The *Globe Equity Decree* has always cast a long shadow over the Gila River adjudication. The motions for summary judgment considered in this report finally provide the adjudication court with an opportunity to determine *Globe Equity's* significance for these proceedings.

II. STATEMENT OF THE CASE

According to the Gila River Indian Community, its aboriginal territory originally consisted of 3.75 million acres, an area that today is bounded by the Gila Bend and White Tank Mountains on the west, present-day Lake Pleasant and

confluence of Salt and Verde Rivers on the north, Tortilla Mountains on the east, and the I-10 and I-8 highway corridor on the south. Statement of Claimant No. 39-36340. The area comprises almost all of the Phoenix metropolitan area.

Both the United States and the Gila River Indian Community filed statements of claimant in the Gila River adjudication for water rights attributable to the Gila River Indian Reservation. The federal claim as trustee was filed in the Lower Gila River Watershed [2] and asserts a current use of 270,000 acre-feet per year [hereinafter "ac-ft/yr"] and a future use of more than 1.5 million ac-ft/yr for irrigation and other purposes including domestic, industrial-commercial, and mining. An unquantified storage right is also asserted. The water is claimed for Indian lands both within and without the San Carlos Project. The source of water includes the Gila River, as well as tributaries not adjudicated by the *Globe Equity Decree.* The claim also says that, in the event that the *Globe Equity Decree* is not found to be determinative of the federal claim, the United States asserts additional rights in the Gila River system sufficient to satisfy the Community's reserved water rights. Statement of Claimant No. 39-35092; *see also* ARIZONA DEPARTMENT OF WATER RESOURCES [ADWR], PRELIMINARY HYDROGRAPHIC SURVEY REPORT FOR THE GILA RIVER INDIAN RESERVATION App. F, at F-53 (Rev. Feb. 3, 1999) [hereinafter "PRELIMINARY HSR"].

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2. Statement of claimant forms were identified by major watersheds allowing claimants to identify the area in which their claimed water rights were located. The federal claim was filed in the Lower Gila River Watershed where the reservation is located.

Appendix E

The Indian Community also filed six statements of claimant on its own behalf in the state general stream adjudication. These claims were filed in five of the seven watersheds comprising the Gila River adjudication (Upper Gila River, Lower Gila River, San Pedro River, Verde River, and Salt River watersheds; not filed in the Upper Santa Cruz or Agua Fria watersheds).[3] Generally, these claims assert water rights of almost 1.6 million ac-ft/yr for irrigated agriculture and a variety of other uses, 205,000 ac-ft/yr for hydropower production, 267,000 ac-ft/yr in storage, as well as groundwater. The irrigation claim is for both San Carlos Project and non-project lands. Statements of Claimant Nos. 39-12652, 39-5478, 39-41142, 39-60083, 39-36340, 39-37360; *see also* PRELIMINARY HSR App. F, at F-52.

The motions for summary judgment at issue here comprise one phase in the progressive determination of the water rights of the Gila River Indian Community, a proceeding known as contested case no. W1-203. In 1995, the Arizona Legislature requested early consideration of the claims of Indian tribes and federal agencies as a strategy for reducing the cost and complexity of Arizona's ongoing general stream adjudications. H.B. 2276, § 24(C), 42d Leg., 1st Sess. (Ariz. 1995). Based on this suggestion and the court's own experience, Judge Susan R. Bolton, the superior court judge presiding over the adjudication, ordered the preparation of the hydrographic survey report (HSR) for the Gila River Indian Reservation. Minute Entry at 1 (Aug. 31,

3. It is unclear whether the Community filed claims throughout most of the Gila River system so as to assert diversions, places of use, or claims to the water arising in these many watersheds. *See supra* note 2.

1995). The Arizona Department of Water Resources prepared a preliminary HSR, issued in January 1997, limited to an estimate of water supply physically available to the reservation, the amount of arable land on the reservation, current water uses on the reservation, and an economic analysis of irrigation practices on or near the reservation. This work was later folded into a more complete preliminary HSR that was released by ADWR on February 3, 1999. This preliminary HSR included information on the available water supply on the date of its creation in 1859 and subsequent additions, irrigation water duties, and a summary of the Community's nonagricultural water right claims. On May 2, 2000, Judge Bolton directed ADWR to proceed with completion of the final HSR once certain allottee information is received from the Gila River Indian Community. Minute Entry at 4 (May 2, 2000). The filing of the final HSR will commence a statutory 180-day objection period and set the stage for evidentiary hearings.

Judge Bolton also set in motion other threshold activities to coincide with ADWR's efforts. In order to complete much of the discovery necessary for this contested case, parties intending to participate at trial were ordered to disclose potentially relevant documents. After a series disclosures extending from 1998 to the present, 18,600 documents, consisting of 146,400 pages, have been submitted to the Office of the Special Master and made available to the parties. Upon the suggestion of many parties, Judge Bolton also ordered the filing of motions that could limit the scope of litigation. Minute Entry at 2-3 (Sept. 11, 1998). The motions considered here are among a series of motions for summary judgment that purport to preclude or limit the water right

claims of the Gila River Indian Community in this general stream adjudication. These motions, which were referred to Special Master John E. Thorson on February 1, 2000, are as follows:

1. Motion for Summary Judgment filed by the Gila Valley Irrigation District, Franklin Irrigation District, San Carlos Irrigation and Drainage District, Salt River Project, and City of Tempe (Mar. 1, 1999), asserting that the water right claims of the Gila River Indian Community, or on its behalf, are precluded by the *Globe Equity Decree* (Docket No. 119).[4]

2. Motion for Summary Judgment filed by the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation (Mar. 1, 1999), asserting that any water right claims of the Gila River Indian Community, or on its behalf, to the San Carlos River are precluded by the *Globe Equity Decree* and other documents (Docket No. 118).

3. Motion for Summary Judgment filed by the San Carlos Irrigation and Drainage District (Oct. 4, 1999), asserting that the water right claims of the Gila River Indian Community, or on its behalf, are conditioned on certain agreements commonly known as the Florence-Casa Grande Landowners' Agreement, San Carlos Irrigation Project

4. The discussion and determination of this motion also includes similar assertions made by the San Carlos Irrigation and Drainage District (Docket No. 206). *See* note 5, *infra*.

Landowners' Agreement, and the Project Repayment Contract (Docket No. 206).[5]

4. Motion for Summary Judgment filed by ASARCO Incorporated (Oct. 4, 1999), asserting that the water right claims of the Gila River Indian Community, or on its behalf, are conditioned by the Water Rights Settlement and Exchange Agreement (Jan. 1, 1977) and the Consent to Assignment [of the Water Rights Settlement and Exchange Agreement] (April 25, 1993) (Docket No. 202).

The litigants joining and opposing these motions are identified in Appendix A, which is also an index of all pleadings filed concerning these motions.

III. PRECLUSIVE EFFECT OF THE *GLOBE EQUITY DECREE*

Motion for Summary Judgment filed by the Gila Valley Irrigation District (GVID), Franklin Irrigation District (FID), San Carlos Irrigation and Drainage District (SCIDD), Salt River Project (SRP), and City of Tempe (Mar. 1, 1999), asserting that the water right claims of the Gila River Indian Community, or on its behalf, are precluded by the *Globe Equity Decree* (Docket No. 119).

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5. Portions of this motion urge the preclusive effect of the *Globe Equity Decree*. For purposes of this discussion and determination, these allegations are combined with the motion for summary judgment filed by the Gila Valley Irrigation District *et al.* (Docket No. 119).

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A. *Introduction*

Globe Equity No. 59 was a federal district court proceeding initiated by the United States in 1925 to assist the San Carlos reclamation project by establishing water rights in the Gila River. The San Carlos Project, among the West's first federal reclamation efforts, was envisioned when the federal Reclamation Act was passed in 1902. The idea was realized in a series of congressional enactments authorizing the construction of the San Tan Canal in 1905, the Florence-Casa Grande Irrigation Project in 1916 resulting in the construction of two diversion dams and canals, and the San Carlos Irrigation Project Act of 1924, authorizing the construction of the San Carlos (later Coolidge) Dam and Reservoir. Act of Mar. 3, 1905, 33 Stat. 1081; Act of May 18, 1916, 39 Stat. 123-30; Act of June 7, 1924, 43 Stat. 475. As stated by the United States,

> The San Carlos Project was intended to be a "combined Indian and white man's irrigation project." Pima Indians and the San Carlos Irrigation Project Hearing on S. 966 Before the House Commissioner [sic] on Indian Affairs, 68 Cong. 1st Session, at 3 (1924). Non-Indian participation in the project was deemed necessary in order to pay for its construction costs.

United States' Response 3 (Oct. 5, 1999) [Docket No. 232].

The federal government brought the *Globe Equity* litigation in its own name but beneficially for the Indians living on the Gila River Indian Reservation, the San Carlos

Apache Reservation, and the reclamation project and its anticipated non-Indian water users who had pledged water rights to enable to project. Among the defendants were many of the litigants (or their successors) now bringing this motion. The litigation concluded in a consent decree entered in 1935 and included detailed schedules of approximately 3,000 water right diversions determined in the proceeding. *Globe Equity Decree* [OSM No. 4].[6] The resulting lengthy, convoluted *Globe Equity Decree* has been the subject of numerous enforcement actions in federal court over the years, and certain interpretative and administration issues are even now pending before federal district court.

Globe Equity is essentially an agricultural decree. Virtually all of the water rights adjudicated are irrigation water rights. One exception appears to be certain industrial, municipal, and domestic rights are recognized for the Kennecott Copper Corporation. *Globe Equity Decree* art. X(1).

In their motion, the moving litigants assert that the *Globe Equity Decree* "resolved all claims of the United States, as trustee for the Indians of the Gila River Indian Reservation, to water from the Gila River for use on the Gila River Indian Reservation." GVID's Motion for Summary Judgment at 1 (Docket No. 119). They ask the court to recognize the

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6. The "OSM No." designation refers to documents submitted to the Office of the Special Master during disclosure by the parties. The full serial number is "OSM No. W1-203-4."

preclusive effect of the *Globe Equity Decree*, under the doctrine of *res judicata.* The Gila River Indian Community and the United States respond (Docket Nos. 216 and 232) that the requirement of a *res judicata* bar are not satisfied; the Community's claims in this adjudication are not precluded by the earlier litigation; and, since material facts are in dispute, such a determination cannot be reached on a motion for summary judgment. The Arizona general stream adjudication statute provides "that when rights to the use of water or dates of appropriation have previously been determined in a prior decree of a court, the court shall accept the determination of such rights and dates of appropriation as found in the prior decree unless such rights have been abandoned." ARIZ. REV. STAT. ANN. § 45-257(B)(1) (Supp. 1999).

At issue in this case are tribal and federal claims for two types of land: (a) additional water rights for the approximately 50,000 acres of reservation land that was awarded water under *Globe Equity;* and (b) water rights for the approximately 325,000 acres of reservation land that were allegedly omitted from the *Globe Equity* litigation. Because the 50,000 acres were originally intended to be allotted to individual Indian farmers, this land is referred to as "allotted" or "allotment" lands in this report. The latter category of land is referred to as "surplus" lands since people at the time assumed the land was surplus to the Indians' needs and eventually would be conveyed to non-Indian farmers by homesteading, sale, or other transactions.

The moving parties here consist of parties to *Globe Equity*, their successors and privities, and other water users

who claim they have relied on the finality of that adjudication. Thus, general principles of the *res judicata* doctrine are central to this report. In the following, *res judicata* is often referred to as "claim preclusion." The related concept of collateral estoppel is often referred to as "issue preclusion."

This controversy closely resembles preclusion litigation concerning the federal *Orr Ditch Decree*, on Nevada's Truckee River, that culminated in a famous U.S. Supreme Court decision, *Nevada v. United States*, 463 U.S. 110 (1983). Our case is also similar to aspects of the even more famous *Arizona v. California* litigation concerning water rights to the Colorado River, and a June 2000 decision in the continuing saga of that case is also of assistance in resolving the issues presented by this motion for summary judgment. A detailed understanding of these cases is necessary to ascertain the guidance the Supreme Court has provided.

B. *Nevada v. United States (Orr Ditch Decree)*

The *Orr Ditch* litigation concerning the Truckee River was originally brought as an equitable action ("Equity No. 3") by the United States in federal district court in 1913, in an effort to adjudicate water rights for the benefit of the Pyramid Lake Indian Reservation and the Newlands Reclamation Project, the first project to be constructed under the 1902 Reclamation Act. The Truckee River originates in the Sierra Nevada Mountains of California, flows into Lake Tahoe, and then north from the lake and easterly into Nevada terminating in Pyramid Lake (on the Indian reservation), a body even larger than Tahoe. The Truckee River is a closed basin that contains 1,872 square miles. Compared to the Gila

River, the Truckee has relatively few tributaries, *e.g.*, the Little Truckee River.

The Pyramid Lake Reservation had been initially set aside for the Paiute Tribe by the Secretary of the Interior in 1859 with President Grant signing an executive order confirming the reservation in 1874. One of the purposes for this reservation "was to enable the Tribe to take advantage of the Pyramid Lake fishery, then consisting of a native species of cutthroat trout, and the cui-ui, which exist nowhere else." *United States v. Truckee-Carson Irr. Dist.*, 649 F.2d 1286, 1290 (9th Cir. 1981). The Indians also began modest irrigated agriculture, consisting of about 1,000 acres at the turn of the century. This compared to about 40,000 acres of non-Indian irrigated agriculture in the Reno area alone. *Id.*

Shortly after passage of the Reclamation Act, the Secretary withdrew public lands for the Newlands Project, to be supplied by water from both the Truckee and Carson Rivers, and asserted claims for all unappropriated water in the Truckee River. In 1904, Congress authorized the Secretary to include reservation lands within the project. About 20,000 acres of the 322,000-acre reservation were thought to be irrigable. The Interior Department planned to convey irrigable land to Indians in 5-acre allotments with the surplus lands being sold to settlers.

The federal government believed a determination of existing water rights was necessary before the Newlands Project could be completed. The extent and relative priorities of Indian and non-Indian rights would have to be determined before Interior could ascertain how much additional water

could be claimed for the project. The case was ultimately filed as a quiet title action on March 3, 1913, naming as defendants all existing water users on the Truckee River in Nevada. The federal complaint, filed by some of the same federal attorneys also involved in the *Globe Equity* proceedings (John Truesdell and, later, Ethelbert Ward), asserted a claim of 10,000 cubic feet per second [cfs] for the project and 500 cfs for the reservation.

For six years after the complaint was filed, the United States completed engineering studies to buttress its claims. Reservation lands fell into two categories: 2,400 acres of riparian lands that were mostly developed and 19,000 acres of less desirable bench lands. While all this land was to be included in the project, the federal attorneys assumed that only 3,000 acres of bench lands would be allotted to Indians; the remaining bench lands would be sold as surplus lands to settlers who would have "'to depend for their water right upon the general project water right.'" *Id.* at 1291 (quoting Ex. U-88 at 2). Thus, the claim asserted in behalf of the Indians was for 5,400 acres (2,400 acres of bottom lands and 3,000 acres of bench lands—out of a reservation of 322,000 acres!).

The case languished in court, but following evidentiary hearings between 1919 and 1921, the Special Master suggested the entry of a temporary restraining order that could be evaluated during a trial period. The temporary order was entered by the federal judge in 1926 and awarded the reservation with 12,412 ac-ft/yr with an 1859 priority date for 3,130 acres of bottom lands, as well as water for the expected number of Indian allotments of bench land. The

reclamation project was awarded water for 232,800 acres although only 65,000 acres would ever be developed. That same year, the federal government signed a contract with the Truckee-Carson Irrigation District allowing this organization of irrigators to operate the reclamation project.

During the 1920s, increasing upstream diversions and the accumulation of logging debris in the waterways combined to decimate the Truckee River fishery. Between 1920 and 1940, the level of Pyramid Lake declined 40 feet, the cut-throat trout were extinct, and cui-ui were just barely surviving. Reno area Indian agents wrote the Commissioner of Indian Affairs in 1935: "'You have assured us ... that it will be practically impossible at this late date to obtain any assured flow of water from the Truckee River into the Lake. The time for that was when the original Truckee River water rights were being adjudicated.'" *Id.* at 1294.

After the Indian Reorganization Act (Wheeler-Howard Act) ended reservation allotments in 1934, ch. 216, 48 Stat. 984 (June 18, 1934), federal attorney Ward suggested to the Bureau of Indian Affairs that a federal reserved right be asserted for all 19,000 acres of arable bench lands. The BIA rejected this possibility because of its 'doubtful feasibility from all standpoints.'" *Id.*

The *Orr Ditch* parties also negotiated a final agreement during the 1930s. The Interior Department, while obtaining an increase in water duty over the 1926 order, agreed to limit its reservation claims to 3,130 acres of bottom land, 2,745 acres of bench land, and no water for the fishery. A consent decree along these lines was entered in 1944.

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The United States appeared in the *Orr Ditch* litigation as trustee for the Pyramid Lake Indians and as representative of the predominately non-Indian reclamation project. While the government succeeded in establishing irrigation rights benefiting both the reservation and the reclamation project, it failed to establish water rights protective of the fishery that was central to the culture and economy of the Paiute Tribe. In 1951, the Pyramid Lake Tribe sued the federal government in the Indian Claims Commission for damage to the fishery, and the Commission found the government liable, leading to a compromise settlement of $8 million. The settlement allowed the Tribe to seek additional rights in the Truckee River. *Id.* at 1295.

1. Federal District Court Proceedings

The decline of the fishery led to a separate federal court action filed in 1973 by the United States and the Pyramid Lake Tribe seeking to quiet title to water sufficient to sustain the Pyramid Lake fishery. Non-Indian water users in the basin defended on the basis of *res judicata*, *i.e.*, the Tribe's rights had been determined in the original *Orr Ditch* litigation. After bifurcating the case and conducting an evidentiary hearing on the *res judicata* defense, the federal district court (Anderson, J.) determined that the original *Orr Ditch Decree* was a bar to the second action. Memorandum Decision, set forth in App. E, Petition for Writ of Certiorari filed by State of Nevada, *Nevada v. United States*, No. 81-2245 (June 7, 1982). This result was affirmed by the U.S. Court of Appeals, *United States v. Truckee-Carson Irr. Dist.*, 649 F.2d 1286 (9th Cir. 1981) (Skopil, J.), and by a unanimous U.S. Supreme Court, *Nevada v. United States*, 463 U.S. 110 (1983) (Rehnquist, J.).

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The district court determined that the causes of action in both cases were the same. The Tribe, one of the plaintiffs in the second action, was in privity with the United States, the plaintiff in the original action. As to whether federal attorneys and officials had a conflict of interest in the original litigation, the district court ruled that federal agency officials had weighed the competing, congressionally imposed policy considerations and reached a decision that resulted in the extinguishment of the alleged fishery purposes water right. The federal attorneys involved in the original *Orr Ditch* proceedings did not have a conflict of interest when implementing the policy choices of their superiors, and the Tribe had not been injured in a way that would defeat the water rights obtained by the defendant non-Indian water users in the original litigation.

2. U.S. Court of Appeals Decision

The court of appeals rejected arguments distinguishing the two causes of action. Dismissing the Tribe's argument that different evidence would be offered to establish a fisheries (rather than irrigation) water right, the court responded:

The basis for either kind of reserved right would be the same: the executive actions by which the Reservation was established, and the intent that motivated those actions. The priority date depended on the same evidence. The water rights are appurtenant to the same reservation, and relate to the same source of water. Though a determination of quantity would depend on different evidence, this by itself is insufficient to distinguish this cause of action from the *Orr Ditch* cause of action.

649 F.2d at 1301 (citations omitted). The court also concluded that the federal government intended an all-inclusive, final adjudication of the Truckee River and that the decree prevented relitigation of both those claims that were litigated and those that could have been litigated, the federal government having "placed in issue the full Reservation cause of action." *Id.* at 1302.

The court addressed the significance of the federal government's conflicting policy interests in the context of privity. The Tribe could be bound by the actions of its fiduciary, the United States, unless other water users were aware of and benefited from the fiduciary's failure to fulfill its trust responsibility. Since the trial court had found that the original defendants lacked such knowledge, the appellate court concluded that the Tribe remained in privity with the United States, the original plaintiff, and *res judicata* could be imposed. The court also extended the benefits of its *res judicata* finding to subsequent appropriators who were not parties to *Orr Ditch* but who had reasonably relied on the finality of the original degree. *Id.* at 1308.

The court of appeals, however, concluded that the Truckee-Carson Irrigation District could not assert the preclusive effect of the original *Orr Ditch Decree*. Like the Tribe, the district had not been party to the original litigation and, like the Tribe, its interests had been represented by the United States. The district did participate in and signed the agreement that was ratified by the 1944 consent decree. Even so, the court concluded that the Tribe and district were not adverse to one another on the record, a stance commonly necessary for *res judicata* to apply. The district was thereby left as the only party vulnerable to the Tribe's claims for

additional water to protect its fishery, an ironic result that was criticized by Judge Schroeder in her partial dissent. *Id.* at 1313.

3. U.S. Supreme Court Opinion

Justice William Rehnquist began his opinion addressing this very issue and providing the rationale for reversing the court of appeals on this question. The solicitor general had characterized the court of appeals' decision (in allowing additional claims against the district) as simply allowing the reallocation of federal reclamation project water to the Indian fishery. Rehnquist indicated that Newlands Reclamation Project water rights were not "like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit." 463 U.S. at 126. Once surplus Indian land had been acquired by settlers, the beneficial ownership of the project water appurtenant to the surplus land also passed to the settlers. The federal government held only nominal title to those rights.

Later in the opinion, Rehnquist quoted approvingly from an Idaho Supreme Court decision: "'[I]t matters but little who are plaintiffs and who are defendants in the settlement of cases of this character; the real issue being who is first in right to the use of the waters in dispute.'" *Id.* (quoting *Morgan v. Udy*, 79 P.2d 295, 299 (Idaho 1938)). Rehnquist also observed that the United States had pleaded the separate interests of the reclamation project and the Tribe. The district had its own attorneys when the settlement was concluded. For these and other reasons, the Supreme Court reversed the court of appeals and determined that the earlier positions of

the Pyramid Lake Tribe and the Truckee-Carson Irrigation District were sufficiently adverse to enable the district to benefit from the *res judicata* defense, precluding new claims for water to support the tribal fishery.

In all other respects, the Supreme Court affirmed the lower courts. The Court emphasized the importance of *res judicata* as a doctrine of finality; otherwise, "'the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgment of such tribunals.'" *Id.* at 129 (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 49 (1897)). Rehnquist elaborated in a footnote:

> The policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water. . . . A quiet title action for the adjudication of water rights, such as the *Orr Ditch* suit, is distinctively equipped to serve these policies because "it enables the court of equity to acquire jurisdiction of all the rights involved and also of all the owners of those rights, and thus settle and permanently adjudicate in a single proceeding all the rights, or claims to rights, of all the claimants to the water taken from a common source of supply." 3 C. Kinney, Law of Irrigation and Water Rights § 1535, p. 2764 (2d ed. 1912).

463 U.S. at 129 n. 10.

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The Court rejected an overly legalistic comparison of the cause of action asserted in the original *Orr Ditch* litigation and the cause of action asserted in the newer case pending before the Court. Rehnquist studied the government's amended complaint and the decree to find references to "the several rights" of the United States, the need to protect Indians' fishing, and language whereby the parties were "forever enjoined" from asserting rights in the Truckee other than those set forth in the *Orr Ditch Decree.* Rehnquist concluded:

> We find it unnecessary . . . to parse any minute differences which these differing tests [for determining *res judicata]* might produce, . . . the only conclusion allowed by the record . . . is that the Government was given an opportunity to litigate the Reservation's entire water rights to the Truckee, and that the Government intended to take advantage of that opportunity.

Id. at 131.

The majority opinion also approved of the manner in which the federal government sought to represent both the interests of the Paiute Tribe and the non-Indian irrigators in the *Orr Ditch* litigation. Distinguishing the Interior Department's obligations from those of a private fiduciary, the Court noted that Congress had required the Secretary "to carry water on at least two shoulders" and "it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well."

Id. at 128. Thus, both the United States and the Paiute Tribe (because its interests were represented by the federal government) were bound by the *Orr Ditch Decree*. *Id.* at 135.

Finally, the Court listed those parties who could use the *Orr Ditch Decree* preclusively against the federal government and the Tribe. They include the parties to the original decree, the farmers comprising the Truckee-Carson Irrigation District, and persons who appropriated Truckee River water subsequent to the *Orr Ditch Decree*. Even though mutuality[7] (a traditional requirement of *res judicata*) was lacking and these subsequent appropriators could not themselves be bound by *Orr Ditch*, the Court recognized that an exception to the mutuality requirement was warranted. These water users

> relied just as much on the *Orr Ditch* decree in participating in the development of western Nevada as have the parties of that case. We agree with the Court of Appeals that under "these circumstances it would be manifestly unjust . . . not to permit subsequent appropriators" to hold the Reservation to the claims it made in *Orr Ditch*. . . .

Id. at 144. A summary of the ability of the various parties and nonparties to the *Orr Ditch* litigation to rely on the decree is provided in Table 1.

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7. As a traditional requirement of the collateral estoppel doctrine, the mutuality rule requires that the party seeking to benefit from estoppel in the second proceeding actually have been at risk in the earlier suit. 18 JAMES WM. MOORE *ET AL.*, MOORE'S FEDERAL PRACTICE § 132.04[2][a] (3d ed. 2000).

Table 1: Preclusive Effect of *Orr Ditch Decree*

Could the Pyramid Lake Paiute Tribe assert as against these persons:	Claims for additional water rights to support the tribal fishery?
Parties and successors to the *Orr Ditch Decree*?	No. "There is no dispute that the *Orr Ditch* defendants were parties to the earlier decree and that they and their successors can rely on the decree." 463 U.S. at 136-37.
Truckee-Carson Irr. Dist. and the Project farmers it represents	No. Even though the United States earlier represented the Tribe and the Project, their interests "were sufficiently adverse so that both are now bound by the final decree entered in the *Orr Ditch* suit." *Id.* at 143.
Nonparties such as subsequent appropriators	No. They "have relied just as much on the *Orr Ditch* decree in participating in the development of western Nevada as have the parties of that case." It would be "'manifestly unjust'" not "to hold the Reservation to the claims it made in *Orr Ditch* . . . ." *Id.* at 144.

The Supreme Court's construction of this mutuality exemption is somewhat confusing. The Court recognizes that "mutuality has been for the most part abandoned in cases involving collateral estoppel," *Id.* at 143; but the Court apparently does not believe that a defensive use of collateral estoppel or issue preclusion alone would be sufficient to protect subsequent appropriators from the tribal fishery claim. Thus, the Court reaches to create a mutuality exception to the *res judicata* doctrine, which normally requires the same parties or their privities in both actions. The subsequent appropriators, however, were obviously not parties (or in privity with parties) to the original *Orr Ditch* proceeding. The Court's awkward construction of this mutuality exception favoring subsequent appropriators seems to be tacit recognition that (a) the fishery claim *could* have been litigated in the *Orr Ditch* case (justifying *res judicata* or claim preclusion) and (b) the fishery claim *was not* actually and necessarily litigated (necessary for collateral estoppel or issue preclusion in the subsequent case). *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 132.03 (3d ed. 2000) [hereinafter "MOORE 3D"].

4. Comparison of *Orr Ditch* and *Globe Equity*

Orr Ditch neglected water for the important tribal fishery. The Gila River Indian Community asserts that the *Globe Equity Decree* omitted sufficient water for both decreed (allotted) lands and almost 325,000 acres of surplus reservation land. The similarities between the cases do not end there. Both proceedings were initiated on interstate rivers to assist in the construction of federal reclamation projects in water-short basins.

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Both proceedings were initiated on interstate rivers to assist in the construction of federal reclamation projects in water-short basins. Both proceedings were brought in federal district court, went through an evidentiary phase before a special master, and resulted in the entry of consent decrees ratifying settlements reached by the parties. Both cases involved the same "cast of characters": the federal government as plaintiff, an Indian Tribe who was not a party to the litigation but whose interests were represented by the United States as trustee, existing non-Indian water users in the upper basin, non-Indian irrigators who would participate in the reclamation project and organize an irrigation district, water users who would establish their water rights subsequent to the decree. Some of the same federal attorneys worked in both cases.

Both cases involved the same types of tribal lands: (a) more arable bottom lands susceptible to easily cultivation; and (b) less arable, less desirable bench or grazing lands. The bottom lands were expected to be allotted to individual Indians in small, irrigated parcels (5 acres each of the Pyramid Lake Reservation). Most of the bench or grazing lands were expected to be transferred as "surplus" lands to non-Indians under the homestead or reclamation acts. Once owned by non-Indians, these lands would receive water, if at all, under rights and sources different from those benefiting the Indian reservation. In both cases, the consent decrees were entered *after* Congress had passed the Indian Reorganization Act that ended the federal program of allotting in severalty the lands of most Indian reservations.

But there are differences between the two cases as well.

The Gila River basin contains 57,850 square miles while the Truckee River basin extends 1,872 square miles. The *Orr Ditch* proceeding involved the entire length of the river in Nevada and all of the Truckee River tributaries in Nevada. *Globe Equity* concerned a 150-mile segment of the river, adjudicated mainstem water rights in both Arizona and New Mexico, but did not establish water rights on the tributaries.

While the Tribes in both basins have sought to revisit the old determinations, the procedural status is different. In Nevada, the United States brought a new proceeding in federal court in 1973 seeking additional rights on the Truckee River to support the tribal fishery and attempted to distinguish the earlier decree as determining only irrigation water rights for the reservation. The Pyramid Lake Paiute Tribe was allowed to intervene.

In Arizona, the United States commenced enforcement proceedings in the *Globe Equity* court and the Gila River Indian Community (along with the San Carlos Apache Tribe) was allowed to intervene in those proceedings. Now, Arizona's general stream adjudication has allowed the Community, and the United States in its behalf, to file claims more extensive than the water rights established for the Community in the *Globe Equity Decree.*

C. *Arizona v. California*

In the original *Arizona v. California* litigation, the U.S. Supreme Court determined water rights as among Arizona, California, and Nevada. 373 U.S. 546 (1963). The Court also adjudicated water rights for several federal agencies and five

Tribes having land along the mainstem of the river. The water rights determined for the reservations were based on the practicably irrigable acreage standard that had been proposed by Special Master Simon Rifkind. In that round of litigation, commonly known as *Arizona I*, the Supreme Court rejected the Master's efforts to finalize contested boundaries for two of the reservations, saying that the quantity of water for those reservations "shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined. . . ." *Arizona v. California*, 376 U.S. 340, 345 (1964) *(Decree)*. While the Court did not accept Rifkind's boundary recommendations (which yielded less acreage than alleged by the United States), the Court did quantify water rights based on the acreage Rifkind had calculated using his proposed boundaries. Later, boundary disputes arose concerning the other three reservations including the Fort Yuma Reservation, home of the Quechan Tribe. *Arizona v. California*, 460 U.S. 605, 630-31 (1983) (*Arizona II*).

In the 1970s, the Department of the Interior took several administrative steps to resolve the contested reservation boundaries. Generally, these actions were secretarial orders or solicitor's opinions "issued unilaterally and without a hearing." *Id.* at 631. One such order was a 1978 secretarial order that purported to nullify an earlier Quechan Tribe land cessation due to the failure of the United States to provide the promised consideration. *Arizona v. California*, 530 U.S. slip. op. at 9 (June 19, 2000). While several California governmental agencies sued in federal court to avoid these administrative actions, *Metropolitan Water Dist. v. United States*, Civ. No. 81-0678-GT(M) (S.D. Cal. Apr. 28, 1982),

the United States and the Tribes (after they were permitted to intervene in the original jurisdiction action) moved the Supreme Court to reopen the 1964 decree to enlarge tribal water rights based on the Department's actions.

These rights alleged by the United States and Tribes were for two types of land: (a) "omitted" lands, apparently irrigable lands within reservation boundaries that had not been claimed by the federal government in the original *Arizona I* litigation; and (b) "boundary" lands for which Master Rifkind recommended boundary adjustments. 460 U.S. at 612.

As to the omitted lands, the Supreme Court recognized the *res judicata* effect of the 1964 decree. *Id.* at 616. Except for a continuing jurisdiction provision in that decree, the Court indicated that "[t]here is no question that if these claims were presented in a different proceeding, a court would be without power to reopen the matter due to the operation of res judicata." *Id.* at 617. The exercise of continuing jurisdiction should be limited, however, and "subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Id.* at 619. The Court found neither exception to be present.

In language foreshadowing the Supreme Court's *Orr Ditch* decision issued later that term, the Court addressed any conflict of interest issues involving the federal government as follows:

> We find no merit in the Tribes' contention that the United States' representation of their interests was inadequate whether because of a claimed

> conflict of interests arising from the Government's interest in securing water rights for other federal property, or otherwise. The United States often represents varied interests in litigation involving water rights, particularly given the large extent and variety of federal land holding in the West.

Id. at 627.

As to the boundary lands, the Court disagreed with Special Master Elbert P. Tuttle that the boundary issues had been "finally determined" by secretarial action. *Id.* at 636. The Court recalled that in the original proceedings before Master Rifkind, all parties had contemplated *judicial* resolution of the boundary issues. *Id.* at 637.

The Court, therefore, urged resolution of these issues in the action still pending in the *Metropolitan* case or in another available judicial forum. *Id.* at 639.

The boundary issues were not resolved in federal district court as the United States finally prevailed on its claim of sovereign immunity in that litigation. *California v. United States*, 490 U.S. 920 (1989) *(per curiam)*. The Colorado River Basin States, without opposition from the United States or Tribes, then asked the Supreme Court to determine whether Fort Yuma and other Tribes were entitled to the disputed boundary lands, and if so, to adjudicate additional water rights. 530 U.S. at __, slip. op. at 5. Proceedings before Special Master Frank McGarr resulted in his recommendation that no additional water rights be awarded.

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The Supreme Court disagreed with the Special Master's result and his reasoning. The Special Master recognized the *res judicata* effect of a Court of Claims judgment in the Quechan Tribe's favor (a basis promptly rejected by the Court) but afforded no *res judicata* effect to the *Arizona I* proceedings because of changed circumstances, *i.e.*, the 1978 secretarial order. The Court also rejected this reasoning, saying "[t]he 1978 Order did not change the underlying facts in dispute; it simply embodied one party's changed view of the import of unchanged facts." 530 U.S. at __, slip. op. at 13. Ultimately, the Court did allow the Quechan Tribe to pursue its claims for additional water, finding that the States' "preclusion defense is inadmissible at this late date . . . ." *Id.* The tribal claims concerning the boundary lands were returned to the Special Master for a determination on the merits. 530 U.S. at __ slip. op. at 25.

The totality of this litigation establishes several principles that are important to the resolution of our case. First, the Supreme Court considers the stability of land and water right titles to be of great importance in the West:

> Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open. Certainty of rights is particularly important with respect to water rights in the Western United States . . . . Recalculating the amount of practicably irrigable acreage runs directly counter to the strong interest in finality in this case.

460 U.S. at 620.

Second, the Court could find no reason to excuse the United States' failure to assert water rights for the omitted lands undisputedly within the reservation. This holding supports the moving parties here who contend that the United States' earlier failure to establish water rights for the surplus lands on the Gila River Indian Reservation is of no legal consequence now.

Third, the "changed circumstances" exception to the finality of past adjudications is to be narrowly drawn. The Court affords little legal significance to a subsequent event, the 1978 secretarial order, indicating that it did not alter the underlying facts in dispute, *i.e.*, the reservation's water rights entitlement. 530 U.S. at __, slip op. at 13. This suggests that even less significance should be given to events that preceded the *Globe Equity Decree*, such as the passage of the 1934 Indian Reorganization Act, ending the allotment period, or even subsequent developments in the federal reserved water rights doctrine.

D. *Findings of Fact*

With the discussion of this important litigation in mind, I return to the *Globe Equity Decree* and address the preclusive effect of this federal court determination. I begin by enumerating those material facts necessary to my decision, which continue to tell the story of the *Globe Equity No. 59* litigation (drawn from the statements of fact submitted by the parties), about which there appears to be no genuine issue or dispute.[8] *See* ARIZ. R. CIV. P. 56(c).

8. Findings of fact and conclusions of law are numbered consecutively throughout the report for easy reference and to avoid confusion.

Appendix E

1. *Finding of Fact No. 1.* The Gila River Indian Reservation was created by Congress in 1859. Act of Feb. 28, 1859, 11 Stat. 401 [OSM No. 112].

2. *Finding of Fact No. 2.* The Gila River Indian Reservation was enlarged through a series of presidential executive orders issued between 1876 and 1915. Exec. Order (Aug. 31, 1876) [OSM No. 134], *as modified by* Exec. Order (Aug. 27, 1914) [OSM No. 144]; Exec. Order (June 14, 1879) [OSM No. 136]; Exec. Order (May 5, 1882) [OSM No. 137]; Exec. Order (Nov. 15, 1883) [OSM No. 138]; Exec. Order (July 31, 1911) [OSM No. 141]; Exec. Order (June 2, 1913) [OSM No. 143]; and Exec. Order (July 19, 1915) [OSM No. 146].

3. *Finding of Fact No. 3.* On February 8, 1887, Congress passed the Dawes or Indian General Allotment Act. Ch. 119, 24 Stat. 388 (Feb. 8, 1887). This legislation set forth the federal Indian policy, known as the Assimilation Period, that extended until 1934 when the Indian Reorganization Act was passed. Ch. 216, 48 Stat. 984 (June 18, 1934). The allotment program contemplated that Indian reservations including the Gila River Indian Reservation would be broken up, irrigable tribal lands conveyed to individual Indians, and remaining surplus tribal lands sold for development.

4. *Finding of Fact No. 4.* By no later than 1872, upstream settlers in the Safford and Duncan-Virden Valleys and in the Florence-Casa Grande area settled along the Gila River and began diverting water from the river for irrigation. PRELIMINARY HSR at C-4. After these diversions began, federal authorities and members of the Gila River Indian

Reservation complained that the Gila Indians were being deprived of water that was rightfully theirs. Bill of Complaint at 5-6, *United States v. Gila Valley Irr. Dist.*, Globe Equity No. 59 (D. Ariz. June 29, 1935) [hereinafter "*Globe Equity No. 59*"] [OSM No. 293].

5. *Finding of Fact No. 5.* The San Carlos Project, among the West's first federal reclamation projects, was envisioned when the federal Reclamation Act was passed in 1902. The Project was built following a series of congressional enactments beginning with the construction of the San Tan Canal in 1905 and the Florence-Casa Grande Irrigation Project in 1916 (authorizing two diversion dams and canals). Act of Mar. 3, 1905, 33 Stat. 1081 [OSM No. 116]; Act of May 18, 1916, 39 Stat. 123-30 [OSM No. 124].

6. *Finding of Fact No. 6.* In 1924, Congress authorized the San Carlos Project itself and the construction of what would be known as Coolidge Dam across the Gila River near San Carlos, Arizona. An Act for the Continuance of Construction Work on the San Carlos Federal Irrigation Project in Arizona and for Other Purposes, 43 Stat. 475-476 (June 7, 1924) [OSM No. 129]. The act stated that the purpose of the Project would be:

> [F]irst, of providing water for the irrigation of lands allotted to Pima Indians on the Gila River Indian Reservation, Arizona, now without an adequate supply of water and, second, for the irrigation of such other lands in public or private ownership, as in the opinion of the said Secretary, can be served with water impounded by said dam

> without diminishing the supply necessary for said Indian lands: *Provided*, That the total cost of the project shall be distributed equally per acre among the lands in Indian ownership and the lands in public or private ownership that can be served from the waters impounded by said dam.

Id.

7. *Finding of Fact No. 7.* The San Carlos Project was intended to be a "combined Indian and white man's irrigation project." Pima Indians and the San Carlos Irrigation Project Hearing on S. 966 Before the House Committee on Indian Affairs, 68 Cong., 1st Session, at 3 (1924). Non-Indian participation in the project was deemed necessary in order to pay for its construction costs. The project was expected to provide water to between 80,000 and 90,000 acres. *Id.* at 35.

8. *Finding of Fact No. 8.* In 1924, the Secretary prepared and subsequently executed a "Landowners' Agreement with the Secretary of the Interior, San Carlos Project: Act of June 7, 1924," as required by the 1924 legislation. The 1924 Landowners' Agreement provided that up to 50,000 acres of Indian allotted lands on the Gila River Indian Reservation could receive water from the San Carlos Project. [OSM No. 153 at 9].

9. *Finding of Fact No. 9.* On October 2, 1925, the United States, on behalf of itself and the Indians living on the Gila River Indian Reservation and the San Carlos Apache Reservation, filed a Bill of Complaint in *Globe Equity No. 59* in the U.S. District Court for the District of Arizona to

adjudicate the waters of the Gila River. The Gila Valley Irrigation District, Franklin Canal Company, and numerous other farmers and diverters in the Safford and Duncan-Virden Valleys were named as defendants [hereinafter "Upper Valley Defendants"]. Bill of Complaint, *Globe Equity No. 59* [OSM No. 293].

10. *Finding of Fact No. 10.* The United States represented multiple interests in the litigation, including the interests of the water users who subsequently formed the San Carlos Irrigation and Drainage District. Edward Smith, Special Assistant to the U.S. Attorney General, stated:

> To put it another way, we have the Government representing itself and the Indians and also representing the water users of the Florence-Casa Grande Valley by reason of the contract [landowner agreements]; opposed to them are the water users of the three districts in the upper valley....

Letter from Edward A. Smith, Special Assistant to the U.S. Attorney General to the U.S. Attorney General (Aug. 8, 1927) at 13-14 [OSM Nos. 5215 and 5216].

11. *Finding of Fact No. 11.* The Bill of Complaint alleged, among other things, that the United States had "reserved and appropriated . . . all of the waters of the said Gila River and its tributaries . . . which may be necessary for the economical and successful irrigation and cultivation" of the lands of the Gila River Indian Reservation. [OSM No. 293, at 21]. It requested that the Court "determine the relative

rights of the parties hereto . . . into and of the waters of the said Gila River. . . ." *Id.* at 23.

12. *Finding of Fact No. 12.* Answers to the Bill of Complaint were filed by the Gila Valley Irrigation District, the Franklin Irrigation District, and farmers and water users in those districts. Answer of the Gila Valley Irr. Dist. *et al.*, *Globe Equity No. 59* (Jan. 30, 1926) [OSM No. 1888]; Answer of the Franklin Irr. Dist. *et al.*, *Globe Equity No. 59* (Mar. 8, 1926) [OSM No. 302].

13. *Finding of Fact No. 13.* Two years after filing the original complaint, the United States filed an Amended Complaint, again naming the Upper Valley Defendants as defendants. Amended Complaint, *Globe Equity No. 59* (Dec. 5, 1927) [OSM No. 5261].

14. *Finding of Fact No. 14.* The Amended Complaint in *Globe Equity No. 59* limits the territorial scope of the adjudication to an area along the Gila River "as it flows between a line 10 miles east of the parallel to the dividing line between Arizona and New Mexico, and the confluence of the Salt River with the Gila River, and after the following tributaries of the Gila River, the San Francisco River, the San Carlos River, the San Pedro River, and the Santa Crus [sic] River, respectively, have joined the main stream. . . ." *Id.* at 32-33.

15. *Finding of Fact No. 15.* The Amended Complaint alleged, among other things:

a. That the suit was "brought by the United States for itself and as Trustee and Guardian for the Pima and

Apache Indians, occupants and possessors of large areas of land with water rights appertaining thereto in the Gila River Indian Reservation . . . ." *Id.* at 11, ¶3.

b. "That the Pima Indians, from time immemorial until the first reservation was made for them by the United States . . . occupied and possessed a large area of land on the Gila River . . . which area included the lands now embraced in the Gila River Indian Reservation. . . . With the lands of said reservation, the Pima Indians also did and do occupy and possess to a large extent the usufruct of the waters of the Gila River, and with said waters at all times have irrigated large areas of said land. The waters thus possessed by said Indians are a quantity sufficient to irrigate the lands subsequently allotted to them as irrigable allotments, said allotments being made to individuals among said Indians and amount to 49,896 acres. . . ." *Id.* at 17-18, ¶¶5-6.

c. That "the United States, by a series of acts of Congress, proclamations, and Executive orders . . . recognized that the lands and waters . . . belonged to the Pima Indians under their title of occupancy and possession and confirmed and made more secure those rights as far as they covered or related to said reservation, and reserved for said Indians the lands and water rights comprised in or connected with the Gila River Indian Reservation. The lands in said reservation are situate in the Counties of Pinal and Maricopa, and comprise about 375,422 acres." *Id.* at 18-19, ¶7(a).

d. That "[t]he water rights reserved in connection with the reservation of said land for the Pima Indians are alleged to be the following, to wit: So much of the waters of

the Gila River as should be needed to carry out the purposes of the United States in recognizing and in making said reservation of lands, and also in accomplishing the civilization and bringing about the prosperity of said Indians." *Id.* at 19, ¶7(b).

16. *Finding of Fact No. 16.* For relief, the United States requested in its Amended Complaint that the Court "determine the rights of the parties hereto to the waters of said river and its tributaries and the right of said parties to divert water from said river within the area aforesaid and for storage above, to the end that it may be known how much of said waters may be diverted from said river by the parties hereto and for what purposes, where, by means of diversion and with what priorities." *Id.* at 34.

17. *Finding of Fact No. 17.* The United States, in its brief filed on December 6, 1927, one day after the amended complaint, discussed the scope of the litigation: "This suit is one to adjudicate water rights within a specified area of the Gila River. . . . The idea is to settle rights of diversion along this stretch of the stream, excluding, however, rights to divert water of the tributaries. . . ." Brief of the United States at 1, *Globe Equity No. 59* (Dec. 6, 1927) [OSM No. 10127].

18. *Finding of Fact No. 18.* John Truesdell, a principal federal attorney involved in *Globe Equity No. 59*, summarized the legal theories that were asserted in the litigation:

a. Rights based on "the Indian right of occupancy and possession prior to the advent of the white man."

b. Rights based upon the "reservations of water made by the United States when Arizona was a territory."

c. Rights based upon "the doctrine of the Winters case" [*Winters v. United States*, 207 U.S. 564 (1908) (recognizing the federal reserved rights doctrine)].

d. Rights based upon "reservations of water made by the United States after Arizona became a State under the doctrine of federal ownership of the usufruct of innavigable waters in the public-land states."

e. Rights based upon "simple appropriations."

Letter from John F. Truesdell, Superintendent of Irrigation, to Edward A. Smith, Special Assistant to the Attorney General at 2-3 (Dec. 13, 1926) [OSM No. 5154].

19. *Finding of Fact No. 19.* John F. Truesdell also discussed the purpose and geographic scope of the litigation:

> The object of the suit is to adjudicate rights to divert water from the Gila River within a defined area, or store it above for use within that area. The suit is in the nature of one to quiet title to real estate. This suit is one to adjudicate water rights within a specified area of the Gila River. That area is defined in the complaint and roughly embodies the stretch of the river extending from the lower or western end of the Gila River Indian Reservation, up that stream, to a line parallel with the boundary between the States of Arizona and New Mexico, but 10 miles east thereof.

Truesdell also indicated that the "idea [of the suit] is to settle rights of diversion along this stretch of the stream, excluding, however, rights to divert water of the tributaries." This would create an "opportunity" for a "full settlement of rights within that area—a settlement between the defendants among themselves, if they so desire, as well as a settlement between the defendants and the plaintiff." Draft Brief of the United States, forwarded by J. Truesdell to G.A. Iverson, Special Assistant to the U.S. Attorney General (Nov. 30, 1927) [OSM Nos. 5259 & 15808].

20. *Finding of Fact No. 20.* John F. Truesdell also discussed the United States' claim for adjudicating a quantity of water for the Gila River Indian Reservation:

> The utmost quantity of water that could be reserved in a stream in the Western States for irrigation purposes would be the amount needed to irrigate all of the irrigable lands on the reservation. But obviously that is only one limit. There are others—such as the number of Indians—and all sorts of other things which go to measure the needs of the Government to carry out its purpose. In practice, we have usually adopted as the best index of those needs, the practice of the Government in alloting [sic] irrigable lands to the Indians and using irrigable lands on the reservation for administrative areas. We, therefore, in this case, claim as our outside claim, under the Indian Title and the broad doctrine of Federal ownership and the doctrine of the Winters case, the quantity of water needed to irrigate the Indian

> allotments and the administrative area, which together amount practically to 50,000 acres.

Letter from John F. Truesdell, Superintendent of Irrigation, to Edward A. Smith, Special Assistant to the U.S. Attorney General at 8 (Aug. 3, 1927) [OSM No. 5210].

21. *Finding of Fact No. 21.* As to other reservation lands not included in this 50,000-acre figure, Truesdell indicated that "[w]e are keeping fully in mind the fact that the Pima Indians will have a vast area beyond this that will be susceptible of irrigation and perhaps can be irrigated by wells, return flow water or otherwise." Letter from John F. Truesdell to Pima Agency (Aug. 4, 1924) [OSM No. 5025].

22. *Finding of Fact No. 22.* The Gila Valley Irrigation District and Franklin Irrigation District filed answers to the Amended Complaint, denying many of the allegations, including the claims that the United States had reserved water rights for the Gila River Indian Reservation. Answer of Gila Valley Irr. Dist. *et al.*, *Globe Equity No. 59* (Aug. 18, 1928) [OSM No. 360]; Answer to Amended Bill of Complaint by Franklin Irr. Dist. *et al.*, *Globe Equity No.* 59 (Jan. 5, 1929) [OSM No. 15674].

23. *Finding of Fact No. 23.* The Court appointed a Special Master, Califford R. McFall, who heard arguments and testimony and admitted exhibits. Index of Exhibits and Transcript of Court Proceedings, Vol. 1 & 2, *Globe Equity No.* 59 [OSM Nos. 15678 & 15679].

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24. *Finding of Fact No. 24.* After filing of the Complaint and the Amended Complaint, the United States and the Upper Valley Defendants engaged in settlement negotiations for many years. Letter from John F. Truesdell, Superintendent of Irrigation, to Charles Burke, Commissioner of Indian Affairs (Feb. 1, 1929) [OSM No. 393].

25. *Finding of Fact No. 25.* The negotiations eventually resulted in a draft consent decree. Letter from Homer Cummings, U.S. Attorney General, to Harold L. Ickes, U.S. Secretary of Interior at 2 (May 3, 1934) (the proposed consent decree "is purposed to take care of the rights of all litigants who are deemed necessary to a complete adjudication") [OSM No. 584].

26. *Finding of Fact No. 26.* Ethelbert Ward, another Special Assistant to the U.S. Attorney General, worked to ensure that the proposed consent decree correctly included all necessary defendants. In a progress report to the U.S. Attorney General, dated November 28, 1933, Ward explained the changes in the number of defendants in the suit since the filing of the original Bill of Complaint:

> The original bill of complaint named 420 defendants as claiming diversion rights from the Gila river [sic] and from its tributaries. The amended bill of complaint named 1364 defendants as claiming diversion rights from the Gila river [sic] only and not from its tributaries. The proposed decree sought to be consented to by all parties names something over 1700 defendants as claiming diversion rights from the Gila river [sic] only.

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Letter from Ethelbert Ward to the U.S. Attorney General (Nov. 28, 1933) [OSM Nos. 1286 & 17179].

27. *Finding of Fact No. 27.* Between the filing of the original bill of complaint and the entry of the consent decree, several hundred defendants were dismissed from the litigation without prejudice, many of whom maintained water uses on tributaries to the Gila River. Letter from Ethelbert Ward to the U.S. Attorney General (Dec. 14, 1933) [OSM No. 5607]; Order Setting Aside Order Pro Confesso and Dismissing as to Certain Defendants, and Order Dismissing Certain Defendants, *Globe Equity No. 59* (both dated Mar. 30, 1935) [OSM Nos. 5687 & 5688]; *see also Globe Equity Decree* art. I & III [OSM No. 4].

28. *Finding of Fact No. 28.* Between the filing of the original bill of complaint and the entry of the consent decree, Congress passed the Indian Reorganization Act effectively ending the allotment and assimilation period of federal Indian policy. The IRA encouraged Indian self-government and self-determination including Indian control over their property and resources.

29. *Finding of Fact No. 29.* The draft consent decree, which was to "definitely determine [ ] the rights of all landowners on the river," was reviewed and approved by the U.S. Attorney General and the Secretary of Interior. Letter from John Collier, Commissioner of Indian Affairs, to Rudolph Johnson, President of Pima Indian Tribal Council at 1 (June 24, 1935) [OSM No. 656].

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30. *Finding of Fact No. 30.* On June 25, 1935, the Pima Indian Tribal Council moved to intervene in *Globe Equity No. 59* as representatives of the Indians on the Gila River Indian Reservation. Petition for Leave to Intervene, *Globe Equity No. 59* (June 25, 1935) [OSM No. 659]. The Court denied the motion. Minute Entry, *Globe Equity No. 59* (June 29, 1935) [OSM No. 5720].

31. *Finding of Fact No. 31.* The proposed consent decree was entered by U.S. District Court Judge Albert M. Sames in *Globe Equity No. 59* on June 29, 1935. The Gila Decree still governs diversions from the Gila River. Final Decree, *Globe Equity No. 59* [OSM No. 4].

32. *Finding of Fact No. 32.* At the time the *Globe Equity Decree* was entered, the Gila River Indian Reservation constituted approximately 375,422 acres. Amended Complaint at 19, ¶7(a) [OSM No. 5261].

33. *Finding of Fact No. 33.* Some of the rights of the United States on behalf of the Gila River Indian Reservation are stated in Article VI of the *Globe Equity Decree* as follows:

a. "The right on behalf of the Pima and other Indians of the Gila River Indian Reservation, their descendants, successors and assigns, to divert 210,000 acre feet of the waters of the Gila River . . . as of an immemorial date of priority . . . for the reclamation and irrigation of the irrigable Indian allotments on said reservation, which amount to 49,896 acres, as they now are or hereafter may be made, and of the administrative area on said Reservation which amounts to 650 acres, to the extent that the herein described water right, which is sufficient for and limited to the needs of

35,000 acres, will reclaim and irrigate the same." Art. VI, ¶1 [OSM No. 4, at 86].

b. "The right to divert 372,000 acre feet of the waters of the Gila River. . . . for the reclamation and irrigation of the 62,000 acres of the irrigable lands of the so-called Florence-Casa Grande Project, or its equivalent, more particularly described as follows: (a) The aforesaid Indian allotments now or hereafter made on the said Indian Reservation, and the said administrative area, amounting in the aggregate to 50,546 acres [49,896 + 650]. . . ." *Id.*

c. "The right to divert 603,276 acre feet of the water of the Gila River . . . for the reclamation and irrigation of the 100,546 acres of the irrigable lands of the San Carlos Project . . . said 100,546 acres of project lands being more particularly described as follows: (a) 49,896 acres of land within the Gila River Indian Reservation which have been, or may be allotted to individuals among the Indians thereof. . . . *Id.* at 98.

34. *Finding of Fact No. 34.* Article XIII of the *Globe Equity Decree* states as follows:

> [E]ach and all of the parties to whom rights to water are decreed in this cause . . . their assigns and successors in interest, servants, agents, attorneys and all persons claiming by, through, or under them and their successors, are hereby forever enjoined and restrained from asserting or claiming—as against any of the parties herein, their assigns or successors, or their rights as decreed herein—any right, title or interest in or

> to the waters of the Gila River, or any thereof, except the rights specified, determined and allowed by this decree . . . the Court retains jurisdiction hereof for the limited purposes above described, this decree otherwise being deemed a final determination of the issues in this cause and of the rights herein defined.

Art. XIII [OSM No. 4, at 113].

E. *Conclusions of Law*

As these facts illuminate, the *Globe Equity* litigation was pitched on the divide between two periods of American Indian law. The general allotment period, which commenced with the passage of the Dawes Act in 1887, came to an ignoble end in 1934 with the enactment of the Indian Reorganization Act (IRA). While millions of acres of tribal land had passed into non-Indian ownership during this half-century, the IRA slowed the fragmentation of Indian lands, renewed the federal government's commitment to reservation life, and reinvigorated tribal governments.

While the IRA ended the allotment program, the legislation did not alter the United States' *Globe Equity* litigation strategy, focused as it had always been on acquiring water for the 50,000 acres of reservation land anticipated to pass to Indian allottees. The federal attorneys had originally assumed the balance of the reservation, consisting of less desirable lands, would be transferred as surplus lands to non-Indians under federal homestead laws or in other transactions. These litigation decisions were made with little or no

consultation with the tribe or tribal members. Indeed, the United States opposed the attempt of the Pima Indian Tribal Council (precursor of the present tribal government and, at the time, apparently encouraged by the IRA's self-government pronouncements) to intervene in *Globe Equity* days before the consent decree was entered.

Because of the IRA, the surplus lands on the Gila River Indian Reservation largely did *not* pass into non-Indian hands; and the Community is left with a *Globe Equity* water rights entitlement that omits much of its land base. The Community and the United States have both used the opportunity afforded by the Gila River adjudication to assert additional claims to both lands decreed under *Globe Equity* and for the surplus lands that were not awarded water. These claims are vigorously opposed by two groups: upper valley water users who were original parties (or privities to such parties) to the *Globe Equity* litigation and who rely on the *res judicata* doctrine, and other water users in the Gila River system who say they have reasonable and settled expectations in the nature and extent of the reservation's water rights as defined by *Globe Equity No. 59*.

More specifically, the preclusive effect of the decree is best established by referring to four specific groups of persons:

1. Persons who were parties to the original *Globe Equity* litigation and who are also before the court in the Gila River adjudication, *e.g.*, the United States, Gila Valley Irrigation District.

2. Successors and privities of persons who were parties to the original *Globe Equity* litigation and who are now before the court in the Gila River adjudication in their own right, *e.g.*, the Gila River Indian Community.

3. Persons or their privities who had water rights in the Gila River system when the *Globe Equity Decree* was entered but were not joined in that litigation or dismissed from it. These persons may have used water upstream in New Mexico, on the Gila's tributaries, or downstream from the area adjudicated in the federal decree.

4. Persons who were not parties to the *Globe Equity* litigation but who have established water rights anywhere in the Gila River system (mainstem or tributaries) since entry of the *Globe Equity Decree.* (While this category may be further divided, such distinctions are unnecessary here).

Groups 1 and 2 raise the question of *res judicata* (claims preclusion). Groups 3 and 4 raise the question of collateral estoppel (issue preclusion). Before addressing these *res judicata* and collateral estoppel issues, I must decide whether federal or Arizona law specifies the requirements to be satisfied before the *Globe Equity Decree* can be afforded *res judicata* or collateral estoppel effect in this adjudication.

1. Choice of Law

The moving parties argue that the federal law of *res judicata* must be applied to determine the claim preclusion

effect of the *Globe Equity Decree* in this adjudication. The Community responds that Arizona law defines *res judicata* for purposes of this proceeding (although they also argue that even under federal law, *res judicata* does not apply).

a. *Conclusion of Law No. 1.* The general rule is that the *res judicata* effect of a federal court judgment is determined by federal law. 1B JAMES WM. MOORE *ET AL.*, MOORE'S FEDERAL PRACTICE ¶¶ 86 & *87* (2d ed. 1996) [hereinafter "MOORE 2D"]. The same rule applies in determining the collateral estoppel effect of a prior judgment, an issue also implicated here. This choice of law selection is especially appropriate when the federal interest was strong in the earlier litigation.

b. *Conclusion of Law No. 2.* The federal law of *res judicata* and collateral estoppel must be applied to determine the preclusive effect of the *Globe Equity Decree* for purposes of this case. This is because the federal interest in the *Globe Equity* litigation was especially strong. The *Globe Equity* litigation involved many federal concerns, *i.e.*, water rights for two Indian reservations, water supply for a federal reclamation project, and an interstate river. Also, Arizona courts have recognized that the law of the jurisdiction in which the judgment was entered should define the prelusive effect of the judgment. *See, e.g., Lofts v. Superior Court*, 140 Ariz. 407, 410, 682 P.2d 412, 415 (1984); *Bill Alexander Ford, Lincoln Mercury, Inc. v. Casa Ford, Inc.*, 187 Ariz. 616, 618, 931 P.2d 1126, 1128 (App. 1996) (Arizona courts follow RESTATEMENT (SECOND) OF CONFLICTS OF LAW (1971), which indicates that effect of valid judgment is determined with reference to the law under which it was rendered).

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2. Federal Doctrine of *Res judicata*

Res judicata is a fundamental social and legal doctrine of finality for disputes that have been fully heard and decided by a fair tribunal. A cause of action asserted and decided once cannot be asserted between the same parties again. The law "prevents an encore" after a party has an opportunity to present his or her case and the matter has been decided. Time and later circumstances may demonstrate the decision to have been ill-advised or incorrect, but the public interest remains strongly against reopening settled controversies.

Federal law, which defines the *res judicata* doctrine for purposes of this case, compares the causes of action or claims asserted in the earlier and later actions to ascertain whether they are the same. The doctrine necessitates that the parties involved in the second case be the same as those in the first proceeding, or be the successors or "privities" of the earlier litigants. The concept of "privity" usually refers to (a) persons having a concurrent relationship to the same property (*e.g.*, trustee—beneficiary); (b) persons having a successive relationship to the same property (*e.g.*, vendor—vendee); or (c) one person representing the interests of another person (*e.g.*, agent). 1B MOORE 2D ¶ 0.411[1]. Generally, a claim or cause of action consists of all of plaintiff's rights to remedies against a defendant arising out of the same transaction or series of transactions. The claim or cause of action "is defined by the injury for which the claimant seeks redress and not by the legal theory on which the claimant relies." *Id.* ¶0.410[1].

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Relying on *Nevada v. United States*, the moving parties argue strongly that the Community's Gila River adjudication claims or causes of action are the same as those in *Globe Equity*. Since the moving parties or their predecessors were parties to *Globe Equity*, they should benefit from those earlier determinations. The statements of claimant filed in this adjudication by the Community and the United States advance a broad array of water rights for the reservation. Many undisputed material facts, however, support the conclusion that this same portfolio of claims was asserted earlier by the United States in *Globe Equity*. This is most convincingly demonstrated in the language of the amended complaint, *e.g.*, "[t]he water rights reserved in connection with the reservation of said land for the Pima Indians are alleged [as] . . . So much of the waters of the Gila River as should be needed to carry out the purposes of the United States in recognizing and in making said reservation of lands, and also in accomplishing the civilization and bringing about the prosperity of said Indians." Amended Complaint ¶ 7(b) [OSM No. 5261]; *see* Finding of Fact No. 15(d), *supra*. John F. Truesdell's summary of legal theories asserted in *Globe Equity* also persuasively demonstrates that the federal government placed in issue its complete portfolio of claims. *See* Finding of Fact No. 18. *Orr Ditch* clarifies that the consideration of the amended complaint is an appropriate inquiry. *See* 463 U.S. at 133.

The Community develops a two-pronged defense to the moving parties' *res judicata* argument. The Community begins by specifying numerous examples of supposed ambiguity or uncertainty the Community believes rise to the level of disputed material facts. The Community then

develops four principal, legal arguments why *res judicata* cannot bar its claims in this adjudication, *i.e.*, consent decrees do not quality for *res judicata* or preclusive effect, the causes of action are different, the parties are different, and circumstances have changed significantly since 1935 making inequitable a preclusive application of the earlier decree. Since I believe the resolution of the Community's legal arguments disposes of many of the factual questions, I take up these arguments first.

a. Consent Decrees

The law is settled that a consent judgment, such as the *Globe Equity Decree*, is entitled to *res judicata* in the same fashion as judgments entered after the completion of litigation. While some decisions have denied *res judicata* effect to a consent decree, saying it is simply a contract, this approach is disfavored. A leading commentator has said, "The [consent] judgment is not, like the settlement agreement out of which it arose, a mere contract *inter partes*. The court is not properly a recorder of contracts; it is an organ of government constituted to make judicial decisions, and when it has rendered a consent judgment it has made an adjudication." 1B MOORE 2D ¶ 0.409[5].

[1] *Conclusion of Law No. 3.* Although entered as a consent decree, the *Globe Equity Decree* may have *res judicata* effect, so long as the other requirements of the *res judicata* or claim preclusion doctrine are satisfied.

b. Same Claim or Cause of Action

The Community argues that its Gila River adjudication claims vary from the rights asserted in *Globe Equity* because the latter claims require different evidence and modes of proof. The Community suggests that different evidence will be necessary to prevail on legal theories that were not asserted in *Globe Equity*, principally the reserved water rights or *Winters* doctrine to establish water rights for lands omitted from the 1935 decree; and to establish water quantities using methods (practicably irrigable acreage (PIA)) that were not recognized in 1935. The Community also goes to great length to distinguish the geographic scope of the two proceedings. GRIC's Response at 21-22.

I have already determined that federal law, focused on the respective causes of action or claims, and not Arizona's "same evidence test," applies to determine the preclusive effect of the federal court decree. In any event, the Community's specification of different legal theories and evidence is unpersuasive. A litigant has an obligation to assert all his legal theories arising from a cause of action in the first instance. A leading treatise indicates, "As a general principle, then, the plaintiff must assert in his first suit all the legal theories that he wishes to assert, and the failure to assert them does not deprive the judgment of its effect as res judicata." 1B MOORE 2D ¶ 0.410[1] (footnotes omitted); *see also id.* at III-193 ("the prevailing view in the courts is in favor of requiring a plaintiff to present in one suit all the claims for relief that he may have against the defendant arising out of the same transaction or occurrence"). The federal attorneys bringing the *Globe Equity* litigation were

aware of the reserved rights doctrine, whether or not it is encapsulated in the decree, as is readily apparent from the documents accompanying the motion. *See* Finding of Fact No. 18, *supra.* Here, as in *Orr Ditch*, the federal government "placed in issue the full Reservation cause of action." 649 F.2d at 1302.

The U.S. Supreme Court itself has indicated that different legal theories do not support an effort to assert in a second round of litigation those remedies that could have been brought in earlier litigation. In *United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. 159 (1971) (Brennan, J.), Congress had passed two statutes (1880 and 1895) terminating the Ute's ownership of lands in southwestern Colorado, the second statute being necessary because the Southern Ute had failed to relocate to Utah. In 1950, the Southern Ute obtained an award from the Indian Claims Commission under the 1880 statute. The Court ruled that a second effort a year later to bring a claim under the 1895 statute, essentially a different legal theory, was barred by *res judicata.*

The differences in geographic scope between the *Globe Equity* litigation and the present adjudication also do not support the conclusion that a new claim or cause of action is being asserted in the Gila River adjudication. For its time, *Globe Equity* was a large case, encompassing most of the settled area of the entire basin adjudicating thousands of relative rights of water users along that segment of the river. It is roughly comparable to the area adjudicated in *Orr Ditch.* The U.S. Supreme Court has recognized that the adjudication of entire river system is unnecessary to qualify the proceeding

as a general stream adjudication for McCarran Amendment purposes.[9] *United States v. District Court*, 401 U.S. 520, 523 (1971) (*Eagle County*) ("We deem almost frivolous the suggestion that the Eagle and its tributaries are not a 'river system' within the meaning of the Act. No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many States."). While the Gila River adjudication comprises the entire basin, the main purpose of this proceeding is the same as in *Globe Equity:* to determine the existing water rights of the parties. *See* ARIZ. REV. STAT. ANN. § 45-252 (1994).

The key to this examination is whether the underlying federal claims or causes of action are the same, and they are. From 1925 to 1935, the federal government, as trustee, sought to establish the water rights for its beneficiaries, the Indians residing on the Gila River Reservation. In retrospect, the federal government may have performed this task poorly, omitting almost 325,000 acres of land from its calculus of water necessary for the reservation. But the federal government had the opportunity—indeed, the obligation—to assert all aspects of its claim; and the language of the decree itself speaks to that aim, *e.g.*:

- The United States is authorized to divert from the Gila River water for those rights "owned by the United States for and on account of the Indians of the Gila River and San Carlos Indian Reservations . . . ." Art. V.

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9. 43 U.S.C. § 666 (1986). The McCarran Amendment is a congressional waiver of federal sovereign immunity allowing the adjudication of federal water rights in comprehensive general stream adjudications.

- The United States "has and owns rights in the waters of the Gila River, and in and to the use of said waters, as follows: [listing of rights]." Art. VI.

- The parties to the decree, including the United States "are hereby forever enjoined and restrained from asserting or claiming—as against any of the parties herein, their assigns or successors, or their rights as decreed herein—any right, title or interest in or to the waters of the Gila River, or any thereof, except the rights specified, determined and allowed by this decree. . . ." Art. XIII.

The federal government's failure to adequately assert all aspects of the Community's claims have properly been the subject of various actions brought by the Community in other forums.

[1] *Conclusion of Law No. 4.* In the *Globe Equity* litigation, extending from 1925 to 1935, the United States was obligated to assert all of its claims to water in the mainstem of the Gila River on behalf of the Indians of the Gila River Reservation, including any rights claimed under the federal reserved water rights doctrine.

[2] *Conclusion of Law No. 5.* The United States represented the interests of the Gila River Indian Community and the members of that community in the *Globe Equity* litigation. The United States, as trustee, held the legal title to the land and appurtenant water rights considered in that proceeding. The Community and its members held equitable title.

[3] *Conclusion of Law No. 6.* As to the water rights pledged to the San Carlos Project, the United States represented the interests of the San Carlos Irrigation and Drainage District and its members in the *Globe Equity* litigation.

[4] *Conclusion of Law No. 7.* In the *Globe Equity* litigation, the United States did intend and did indeed place in issue any and all claims it could assert to water in the mainstem of the Gila River on behalf of the Indians of the Gila River Reservation.

[5] *Conclusion of Law No. 8.* The *Globe Equity Decree* has *res judicata* or claim preclusion effect. As to original *Globe Equity* parties, their successors, or their privities, neither the United States nor the Indian Community may assert in the Gila River adjudication any additional water rights to the mainstem of the Gila River as these claims are the same claims or causes of action asserted in the *Globe Equity* litigation. The only water right claims not precluded are any claims for appropriative or reserved water rights for land acquired or withdrawn since the entry of the *Globe Equity Decree.*

c. Same Parties

The Gila River Indian Community argues that *res judicata* cannot be granted because the parties involved in *Globe Equity* are different from those involved in the present adjudication. The Community's central point is that water users outside the upper Gila region were left out of *Globe Equity* while the present adjudication includes most of these

users. *Globe Equity* involved the United States and many of the same Upper Valley Defendants who are now claimants in the Gila River adjudication, while neither the Community nor the San Carlos Irrigation and Drainage District were parties to *Globe Equity* (although SCIDD through its attorney ultimately signed the consent decree). Since the Community and SCIDD were both represented by the United States, the Community also argues, the litigation lacked the adversity necessary for the *Globe Equity Decree* to be acknowledged as an adjudication as between them.

Concerning the question of party identity, the *res judicata* doctrine does not require a complete identity of parties between the first and second actions—only that the party seeking claim preclusion and the precluded party (or their privities) have been involved in both cases. Both the Community and SCIDD were privities of the United States since the federal government represented and asserted their rights in the case. *See* Finding of Fact No. 10, *supra.* Since many water users, such as the Gila Valley Irrigation District and the Franklin Irrigation District, are parties in both cases, they are able to urge *Globe Equity's* preclusive effect. As to other Gila River adjudication claimants who were not parties (or privities) to *Globe Equity*, they may benefit from collateral estoppel or issue preclusion only as to those matters actually litigated in *Globe Equity. See* discussion, *infra* pp. 59-65.

As to the alleged lack of adversity between the interests of the Community and SCIDD, our situation is closely resembles that considered by the Supreme Court in *Orr Ditch.* Distinguishing the proceeding from one involving normal trust law, the Court indicated there that "under the

circumstances . . . the interests of the Tribe and the Project landowners were sufficiently adverse so that both are now bound by the final decree." 463 U.S. at 143. If this were not the outcome in our case, SCIDD (who participated as a partner in the San Carlos Project) would be vulnerable to tribal claims for additional water for both the allotted and surplus lands. The District, an original partner in the San Carlos Project, would be left with some of the poorest water rights in the basin. A leading commentator suggests the absurdity of such a result: "There would be very little to be said for a rule that would make a determination conclusive against a party in litigation with anyone in the world except his co-party." MOORE 2D at ¶ 0.411[2].

[1] *Conclusion of Law No. 9.* The Gila River Indian Community was in privity with the United States, a party to the *Globe Equity* litigation.

[2] *Conclusion of Law No. 10.* The San Carlos Irrigation and Drainage District was in privity with the United States, a party to the *Globe Equity* litigation.

[3] *Conclusion of Law No. 11.* The *Globe Equity Decree* accomplished a thorough and complete specification of the water rights determined in that proceeding, including the relative water rights of the San Carlos Irrigation and Drainage District and the Gila River Indian Reservation to the mainstem of the Gila River. *See* discussion p. 20, *supra.*

[4] *Conclusion of Law No. 12.* Under the holding of *Nevada v. United States*, 463 U.S. 110 (1983), the interests of the Gila River Indian Community and the San Carlos Irrigation and Drainage District were adverse.

d. Changed Circumstances

The Community suggests that "[t]here have been overwhelming changes in the law, the technology, and legal circumstances" since *Globe Equity* that would allow relitigation of the Community's claims in this adjudication. GRIC's Response at *32*. Authorization for the Gila River adjudication, says the Community, is itself an example of such a significant change. The Community also points to changes in legal theories, *e.g.*, whether *Winters* rights may be asserted in behalf of executive order reservations, and recognition of the "practicably irrigable acreage (PIA)" standard by the U.S. Supreme Court. *Arizona v. California*, 373 U.S. 546 (1963).

New facts since the original litigation do not usually create new claims or causes of action. Theories of liability that could have been asserted in the first action are barred in the second action. This includes actions based on different legal theories but having the same factual basis and actions based on different statutes. *See* discussion *supra* pp. 50-54. Changes in law resulting from appellate decisions usually do not create new causes of action. 18 MOORE 3D § 131.21. New or evolving legal theories rarely provide an opportunity to reopen civil cases decided under earlier law. *See generally* IB MOORE 2D ¶ 0.410[1].

Arizona's general stream adjudication is not a substantive basis for establishing new water rights but a procedural mechanism for recognizing existing rights. The Community cannot assert additional water rights in the adjudication any more than a tort victim, who successfully litigated a claim,

can bring a new action based on a doctor's bill omitted from the proof in the first action. Indeed, the Arizona statute compels the recognition, not the reopening, of prior decrees. ARIZ. REV. STAT. ANN. § 45-257(B)(1) (Supp. 1999).

The undisputed facts demonstrate that the United States advanced a complete array of legal theories for water rights for reservation lands, including lands added by presidential executive order. *See* Findings of Fact No. 18-20, 34. The allotted lands had been selected because of their arability. While the practicably irrigable acreage (PIA) standard had not been specifically adopted by the *Globe Equity-era* courts, PIA is only a different evidentiary method, much like using new magnetic resonance imagery (MRI), rather than x-rays, to prove soft-tissue injuries. We do not reopen adjudicated cases because of such advances in evidentiary proof.

[1] *Conclusion of Law No. 13.* The claims asserted by the United States and the Gila River Indian Community in the Gila River adjudication have the same factual and legal basis as the claims asserted by the United States in the *Globe Equity* litigation.

[2] *Conclusion of Law No. 14.* Changes in facts, law, technology, or legal circumstance since the original litigation do not normally justify the assertion of new claims or causes of action in subsequent litigation.

[3] *Conclusion of Law No. 15.* There are no changes in facts, law, technology, or legal circumstance sufficient to overcome the *res judicata* or claim preclusion effect of the *Globe Equity Decree* that would allow the United States or

the Community to assert new water right claims in this adjudication to the Gila River mainstem. An exception would be for any claims for appropriative or reserved water rights for land acquired or withdrawn since the entry of the *GIobe Equity Decree.*

3. Federal Doctrine of Collateral Estoppel

Under the collateral estoppel doctrine, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1978) (citations omitted). Collateral estoppel, also known as issue preclusion, shares the same purpose as the related *res judicata* doctrine, *i.e.*, that once "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction [it] cannot be disputed in a subsequent suit between the same parties or their privities." MOORE 3D at § 132.01[4][a]. The doctrines differ, however, in important respects.

First, the traditional requirement of mutuality is relaxed, allowing nonparties to the original litigation to benefit from the preclusive effect of an earlier judgment or determination. Preclusion can be urged in either an offensive or defensive manner. A nonparty to the original litigation may assert the earlier determination as an affirmative defense, urging that the issue was determined adversely to the plaintiff in the first case. A nonparty may also assert the original determination as the plaintiff in a new lawsuit, arguing that the defendant's liability or vulnerability on an issue was established in the earlier case.

Second, under collateral estoppel, the preclusive effect of the earlier determination is limited to issues of law or fact that were actually and necessarily decided in the earlier case. As compared to claim preclusion,

> issue preclusion does not prohibit a party from litigating issues that were never argued or decided in the prior proceeding. Inasmuch as the cause of action involved in the second proceeding is not "swallowed by the judgment in the prior suit," the parties are free to litigate points that were not at issue in the first proceeding, even though those points might have been tendered and decided at that time.

18 MOORE 3D at § 132.01 [4] [c].

Third, earlier consent judgments are not given preclusive effect under collateral estoppel. Consent judgments, however, may have preclusive effect if the parties clearly express their intention to that end. *Id.* § 132.03[2][i] & [ii]. *See also Sekaquaptewa v. MacDonald*, 575 F.2d 239 (9th Cir. 1978) (although the Hopi and Navajo tribes had stipulated to boundary line adjustments in earlier litigation, the issue was not actually litigated or necessary to the determinations made in the earlier case).

In the present case, collateral estoppel or issue preclusion is urged by those persons not parties (or privities of parties) to the *Globe Equity* litigation. These persons include those (such as the Salt River Project) who had water rights in the Gila River system when *Globe Equity* was decided but who

had not been joined in that litigation or were dismissed from it, as well as post-*Globe Equity* users of water in the system. *See* categories 3 & 4, *supra* pp. 45-46. The moving parties, however, do not fashion a collateral estoppel argument in favor of these persons. They rather rely on the mutuality exception to the *res judicata* doctrine crafted by the U.S. Supreme Court in *Orr Ditch*. They suggest:

> As the Supreme Court emphasized in Nevada, the *in rem* nature of comprehensive water rights adjudications requires that such proceedings be excepted from the mutuality of parties requirement, usually applicable to prior actions given *res judicata* effect.

GVID's Motion at 28-29 (footnotes omitted). This mutuality exception is addressed in more detail in the next section.

The Gila River Indian Community responds by delineating its reasons why the *Orr Ditch* rationale is inapplicable to the present case. The Community notes that the moving parties did not specifically advance a collateral estoppel argument, saying such an argument would fail because the issues now before the court were not actually litigated or essential to the *Globe Equity* decision. GRIC's Response at 45. In support, the United States adds that *Globe Equity* did not adjudicate "all of the United States' rights to the Gila Decree as against all claimants within the river system and source." United States' Response at 9.

One is required to ascertain whether an issue pending in the present case was "actually and necessarily" litigated in

the earlier proceeding. In *Montana*, *supra*, the U.S. Supreme Court prevented the federal government from renewing a challenge to a state's gross receipts tax, saying that the "precise constitutional claim" had been litigated and lost in the state courts. 440 U.S. at 156. The Court borrowed from an earlier case to state the applicable test "the 'question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged' adversely to the Government in state court." *Id.* at 157 (quoting *United States v. Moser*, 266 U.S. 236, 242 (1924)). To avoid this result, the federal government would have to demonstrate significant changes in important facts or legal principles, or other special circumstances. *Id.* at 157-58.

THE RESTATEMENT (SECOND) OF JUDGMENTS provides guidance in determining whether an issue is the same between an earlier and later case. The treatise suggests the consideration of these factors:

1. Is there is substantial overlap between the evidence or argument?

2. Does the new evidence or argument in the second case involve the same rule of law as in the previous case?

3. Could pretrial preparation and discovery in the earlier case reasonably embrace the issue?

4. How closely related are the daims in both cases.

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RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1982).

I conclude that the collateral estoppel doctrine actually does resolve some of the questions raised in the moving parties' motion. In our case, the question is whether water rights for the surplus lands was an issue actually and necessarily determined in the *Globe Equity* litigation. While some parties might argue that additional water rights or uses for allotted lands were issues not decided in *Globe Equity*, I believe that there is no question that the full array water rights for the allotted lands was an issue "actually and necessarily" determined in those proceedings. *See* Finding of Fact No. 18 & Conclusion of Law No. 7, *supra.*

As to the surplus lands, however, the RESTATEMENT guidelines fail to suggest a definitive result which is a sufficient reason in itself to avoid a finding of collateral estoppel as to these lands. The facts are uncertain as to whether water rights were "actually and necessarily" adjudicated in *Globe Equity* for the surplus lands. In some respects, the issue appears identical between both proceedings: the legal basis for both allotted and surplus lands was the same (*i.e.*, appropriative rights and the federal reserved rights doctrines). The arability and other characteristics of this land could have been addressed in discovery, to the extent discovery was practiced in the 1920s and 1930s. The evidence for the surplus lands, however, would have needed to be customized for those lands. All told, the question is a close call.

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A separate and sufficient reason exists for denying collateral effect to *Globe Equity* proceedings as to the surplus lands. As discussed above, consent decrees like *Globe Equity* are not entitled to such preclusive effect unless the parties so intend. While I believe there is no question that the *Globe Equity* parties had this intent as to the allotted lands, *see* Finding of Fact No. 34, the facts are unsettled as to whether the parties also intended that the decree have such issue preclusion effect as to the surplus lands. *See* Finding of Fact No. 21. On this motion for summary judgment, therefore, I find that nonparties cannot assert the preclusive effect of the *Decree* under the collateral estoppel doctrine as to surplus lands.

There is credible evidence that the *Globe Equity* court did not specifically consider, and did not adjudicate, water rights for the surplus lands on the apparent assumption that these lands would be watered, if at all, from some other sources. The *Globe Equity Decree* determined water rights for the allotted lands; it apparently did not do so for the surplus lands.

a. *Conclusion of Law No. 16.* The water rights of the Indian Community and its members to allotted lands were actually and necessarily litigated and determined in the *Globe Equity* proceedings.

b. *Conclusion of Law No. 17.* Consent decrees, such as the *Globe Equity Decree*, do not have collateral estoppel or issue preclusion effect unless the parties specifically intend such effect.

c. *Conclusion of Law No. 18.* The water right determinations for the allotted lands have collateral estoppel or issue preclusion effect since there is no genuine dispute that the parties to the *Globe Equity Decree* intended such preclusive effect. Nonparties[10] to the decree may assert the preclusive effect of the decree as to these allotted lands.

d. *Conclusion of Law No. 19.* The material facts are in dispute as to whether water rights for the surplus lands was an issue actually and necessarily determined in the *Globe Equity* proceedings. Indeed, much of the evidence runs contrary, *i.e.*, supporting the conclusion that other sources of water would have to be acquired for these lands.

e. *Conclusion of Law No. 20.* There has been no credible showing here that the *Globe Equity* parties specifically intended the decree to have preclusive effect on the issue of water rights for the surplus lands.

f. *Conclusion of Law No. 21.* Material facts are genuinely in dispute as to whether the issue of water rights for surplus lands was actually and necessarily determined in *Globe Equity.* Summary judgment on the question of the preclusive effect of the *Globe Equity Decree* as to surplus lands, therefore, is unavailable.

g. *Conclusion of Law No. 22.*, Because it is uncertain whether *Globe Equity* actually determined federal reserved

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10. In these conclusions of law, "nonparty" means a person who was not a party to the *Globe Equity Decree*, a successor of such a party, or a person in privity with such a party. *See* pp. 48, *supra*, for a discussion of the meaning of "privity."

rights or appropriative rights for surplus lands, nonparties to the decree may not assert collateral estoppel against the Community on that issue. Unless an evidentiary hearing establishes that *Winters* or other water rights to surplus lands were actually determined in *Globe Equity*, the Community and United States are free to pursue water rights for these surplus lands in this adjudication. Such rights, if established, would be enforceable only against those persons who were not parties, successors, or privities to the *Globe Equity Decree.*

4. *Orr Ditch* Exception to *Res Judicata's* Mutuality Requirement

As previously reviewed, the Supreme Court in *Orr Ditch* created an exception to the traditional mutuality requirement for the *res judicata* doctrine. *See* discussion, *supra* pp. 22-23. The Court reasoned why subsequent Truckee River water users, who were not parties to the *Orr Ditch* litigation, could hold the Tribe to the water rights adjudicated in the earlier proceeding. Not relying on a collateral estoppel argument to reach this result, the Court seems to recognize that (a) the tribal fishery claim *could* have been litigated in *Orr Ditch* (thus justifying claim preclusion) and (b) the fishery claim *was not* actually and necessarily litigated (required for issue preclusion in the subsequent case).

Since I am unable to conclude that the Gila River Indian Community's present claim to water for the surplus lands was an issue previously decided in *Globe Equity*, I must address the *Orr Ditch* exception to the mutuality requirement for *res judicata.* The argument which is strongly and

repeatedly urged by the moving parties is that, like *Orr Ditch*, nonparties throughout the Gila River system have detrimentally relied on the *Globe Equity Decree* as the final statement of all water rights for the reservation.

Every sophisticated water user in the Gila River system is aware of *Globe Equity's* existence if not its precise meaning. However, when Justice Rehnquist concluded that "[n]onparties such as the subsequent appropriators in these cases have relied just as much on the *Orr Ditch Decree* in participating in the development of western Nevada as have the parties of that case," 463 U.S. at 144, he was doing so based on a factual record demonstrating that reliance. Indeed, the trial judge had found

> That the defendants in *Orr Ditch* and their successors in interest in this case, as well as other persons, firms, corporations, entities, governmental units, agriculture, business, industry, and labor have detrimentally relied upon the terms and conditions and the final and conclusive nature of the *Orr Ditch* final decree.

Finding of Fact No. 27, set forth in App. F to Petition for Writ of Certiorari filed by State of Nevada, *Nevada v. United States*, No. 81-2245 (June 7, 1982). This determination had been reached after evidentiary hearings extending over many months on the *res judicata* defense.

In our case, there is no uncontroverted showing of detrimental reliance by nonparties on the *Globe Equity Decree*. While there are examples of such reliance, they are

not so commonly and undisputedly known as to allow judicial notice to be taken of such reliance. It would be improvident to grant the motion for summary judgment on this affirmative defense without an evidentiary hearing.

a. *Conclusion of Law No. 23.* Since material facts are in dispute whether many nonparties relied to their detriment on the *Globe Equity Decree's* determination of water rights for the Gila River Indian Community, nonparties cannot invoke the *Orr Ditch* exception to the mutuality requirement of the *res judicata* doctrine. Nonparties, therefore, cannot assert that water right claims in this adjudication for surplus lands are precluded by *res judicata*, and the United States and the Community may continue to assert water rights for these lands. Nonparties can assert, however, that additional water right claims for allotted lands are barred under the collateral estoppel or issue preclusion doctrine, as previously recognized in Conclusion of Law No. 18, *supra.*

5. Responses to Other of the Community's Arguments

The Community identifies many instances of what they believe are unsettled, ambiguous, or disputed material facts. Because of these uncertain facts, the Community concludes that summary judgment cannot be granted. I address most of the instances identified by the Community. In all cases, I conclude that there is no genuine dispute concerning a fact material to the motion for summary judgment or, if a factual uncertainty exists, is immaterial to the present inquiry.

Appendix E

a. *Conclusion of Law No. 24. Is the Globe Equity Decree Ambiguous?* The Community argues that the *Globe Equity Decree* is ambiguous and its interpretation requires the consideration of extrinsic evidence, an impermissible inquiry on a motion for summary judgment. Even if the decree is itself ambiguous, this ambiguity does not concern a material fact that would prevent summary judgment. The motion here does not seek an interpretation of a decree or contract. Rather, the motion asks for a determination of the *Globe Equity Decree's* preclusive effect. To decide this motion and interpret what was decided in the earlier litigation, the court is entitled to compare the records in both proceedings. Evidence beyond the decree itself can be used so long as its satisfies the requirements of Rule 56(c), ARIZ. R. CIV. P. The court can examine the amended complaint and other pleadings, as did the federal courts considering the *Orr Ditch Decree. See, e.g.*, 463 U.S. at 132 ("we return to the amended complaint, where it is alleged. . . .").

b. *Conclusion of Law No. 25. Did Globe Equity adjudicate the entire Gila River system?* This issue has been addressed in the foregoing discussion. *See* discussion, pp. 52-53, *supra.* The Community's claims or causes of action were the same in both proceedings. *Globe Equity* did not adjudicate the entire Gila River, but that fact is inconsequential.

c. *Conclusion of Law No. 26. Did Globe Equity adjudicate reservation lands outside the boundaries of the San Carlos Project?* For *res judicata* purposes, the question is immaterial since the United States had the obligation to place all of its claims at issue. The question does have

significance for collateral estoppel purposes, which has been previously discussed. *See* discussion, pp. 59-65, *supra.*

d. *Conclusion of Law No. 27. Did Globe Equity adjudicate all lands owned by non-Indian parties?* The pending motion is addressed to the water right claims of the Gila River Indian Community. The question is immaterial to that motion. The possible preclusive effect of the *Globe Equity Decree* on other parties to the adjudication is an issue raised by other motions before the court. To the extent this question relates to the comparability of *Globe Equity* and this adjudication, it is an issue discussed elsewhere. *See* discussion, pp. 50-54, *supra.*

e. *Conclusion of Law No. 28. Did Globe Equity adjudicate the water rights appurtenant to all lands within four counties, all lands within Arizona, or all lands within New Mexico?* While the Community's argument here is unclear, it is apparently a variation of the Community's principal argument about the differences between *Globe Equity* and the present adjudication. That argument is addressed elsewhere, *see* discussion pp. 50-54, *supra*, leading to the conclusion that the geographic scope of the cases is immaterial since the same claim or cause of action was asserted by or for the Community in both cases.

f. *Conclusion of Law No. 29. Did Globe Equity adjudicate federal reserved water (Winters) rights for allotment lands?* I have determined that the United States asserted in *Globe Equity* a full array of legal theories, including the reserved rights doctrine for allotted lands. This finding is beyond genuine controversy. *See* Findings of Fact

Nos. 18-20. Even assuming there was factual uncertainty as to whether the United States asserted reserved rights for allotment lands, the factual uncertainty would have no legal significance. The *Winters* doctrine was announced decades before the *Globe Equity* litigation and was well-known to the federal attorneys involved in the case. *Winters* constituted only a different legal theory that *could* and *should* have been asserted in *Globe Equity*, even if it was not.

g. *Conclusion of Law No. 30. Did Globe Equity adjudicate federal reserved (Winters) rights for the entire reservation, including the surplus lands that ultimately remained part of the reservation?* For *res judicata* or claim preclusion purposes, the factual uncertainty does not have legal significance. The *Winters* doctrine was announced decades before the decree and was well-known to the federal attorneys involved in the case. The Indian Reorganization Act, which ended the allotment and surplus land disposal program, was enacted a year before the decree. The United States was obligated to assert all claims arising from the same transaction or series of transactions, here the original and all subsequent land withdrawals for the reservation. If the United States failed to assert these claims, the Indian Community and United States are barred under the claim preclusion doctrine. *See* discussion pp. 47-59, *supra.*

I do agree with the Community that it is factually uncertain whether *Globe Equity* constituted a specific adjudication of federal reserved rights *(Winters* rights) for the surplus lands that were originally intended to be sold or transferred to non-Indians. *See* Conclusion of Law No. 19. Thus, the question has significance under the collateral

estoppel doctrine, as previously discussed. *See* discussion pp. 53-59, *supra.*

h. *Conclusion of Law No. 31. Were water users on the Gila River's tributaries also parties to Globe Equity?* Unless they also had rights on the Gila River mainstem, water users on the Gila River's tributaries were not joined as defendants in the *Globe Equity* litigation or were dismissed from the case without prejudice. Although they were not parties, these tributary users can use the *Orr Ditch* exception to the *res judicata* mutuality requirement, as well as the collateral estoppel doctrine, to hold the Community to the *Globe Equity* award of water for allotment lands. *See* discussion pp. 59-65, *supra.*

i. *Conclusion of Law No. 32. Was Globe Equity a sufficiently comprehensive adjudication so as to provide a legal basis for detrimental reliance by others, including water users on tributaries and subsequent users?* This question has been discussed in the context of whether the United States' and the Community's claims are the same in *Globe Equity* and this proceeding. Both cases involve a significant geographic scope. In both cases, the federal and tribal claims have the same factual and legal basis. *See* discussion pp. 50-54, *supra.*

F. Recommendation

The motion of the Gila Valley Irrigation District *et al.* should be GRANTED IN PART and DENIED IN PART. The original parties to the *Globe Equity Decree*, their successors, and their privities (categories 1 and 2 of persons, including

the San Carlos Irrigation and Drainage District; *see* pp. 45-46, *supra)* can successfully use the affirmative defense of *res judicata* or claim preclusion to bar the United States and the Gila River Indian Community from asserting any additional water rights for the Gila River Indian Reservation (including the allotted and surplus portions). These persons are entitled to maintain that *Globe Equity* was a complete and final adjudication of all claims of the Gila River Indian Community, the members of that Community, and the United States on their behalf to water for all purposes appurtenant to the Gila River Indian Reservation.

Nonparties to the *Globe Equity Decree* (categories 3 and 4 of persons) can successfully invoke both collateral estoppel (issue preclusion) and the *Orr Ditch res judicata* mutuality exception as affirmative defenses to prevent the United States and the Gila River Indian Community from asserting any additional water rights or uses appurtenant to the allotted land portion of the reservation. For this allotted portion of the reservation, nonparties are entitled to maintain that *Globe Equity* was a complete and final adjudication of all claims of the Gila River Indian Community, the members of that Community, and the United States on their behalf to water for all purposes appurtenant to the allotted portion of the reservation.[11]

As against nonparties to the *Globe Equity Decree*, the United States and the Gila River Indian Community may

11. This report does not preclude the United States or the Community, by invoking the appropriate legal procedures, from seeking changes of use in the water rights already adjudicated or acquired for the reservation.

continue to assert additional water right claims for the surplus land portion of the reservation. These nonparties, however, may attempt to prove the basis for the *Orr Ditch res judicata* mutuality exception during trial on the merits of the federal and tribal claims or during a specifically scheduled evidentiary hearing on the question. A summary of these determinations is set forth in Table 2.

Nonparties to the *Globe Equity Decree* (categories 3 and 4 of persons) can successfully invoke both collateral estoppel (issue preclusion) and the *Orr Ditch res judicata* mutuality exception as affirmative defenses to prevent the United States and the Gila River Indian Community from asserting any additional water rights or uses appurtenant to the allotted land portion of the reservation. For this allotted portion of the reservation, nonparties are entitled to maintain that *Globe Equity* was a complete and final adjudication of all claims of the Gila River Indian Community, the members of that Community, and the United States on their behalf to water for all purposes appurtenant to the allotted portion of the reservation.[11]

As against nonparties to the *Globe Equity Decree*, the United States and the Gila River Indian Community may continue to assert additional water right claims for the surplus land portion of the reservation. These nonparties, however, may attempt to prove the basis for the *Orr Ditch res judicata* mutuality exception during trial on the merits of the federal and tribal claims or during a specifically scheduled evidentiary hearing on the question. A summary of these determinations is set forth in Table 2.

Table 2: Preclusive Effect of *Globe Equity No. 59 Decree*

Can GRIC/US assert as against these parties:	Additional water rights for allotment lands?	Additional water rights for surplus lands?
Original parties to *Globe Equity*	No, barred by *res judicata* (claim preclusion)	No, barred by *res judicata* (claim preclusion)
Successors to or privities of *Globe Equity* parties	No, barred by *res judicata* (claim preclusion)	No, barred by *res judicata* (claim preclusion)
Water users who were not joined in *Globe Equity* or dismissed from it (*e.g.*, certain NM users, tributary users, downstream users	No, barred by collateral estoppel (defensive issue preclusion as to issue "actually litigated") & by *Orr Ditch* mutuality exception to *res judicata* doctrine	Yes, consent judgment not entitled to collateral estoppel effect; genuine issue about whether issue was "actually litigated"
Water users subsequent to *Globe Equity*	No, barred by collateral estoppel (defensive issue preclusion as to issue "actually litigated") & by *Orr Ditch* mutuality exception to *res judicata* doctrine	Yes, consent judgment not entitled to collateral estoppel effect; genuine issue about whether issues was "actually litigated"

Appendix E

IV. CLAIMS TO THE SAN CARLOS RIVER

Motion for Summary Judgment filed by the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation (Mar. 1, 1999), asserting that any water right claims of the Gila River Indian Community, or on its behalf, to the San Carlos River are precluded by the *Globe Equity Decree* and other documents (Docket No. 118).

A. *Introduction*

The 1924 Landowners' Agreement between the United States and the landowners to be included in the San Carlos Project included an itemization of the water rights being pledged to the project by the signatories to the agreement. These sources of water included (a) the water rights of the earlier Florence-Casa Grande Project; (b) water rights (except well water rights) appurtenant to other private land being brought into the new project; (c) water rights acquired by the United States for the project; and (d) certain Indian water rights in the Gila River above the inflow of the Salt River. OSM No. 153, at 7.

This last category of pledged water rights is the subject of the motion for summary judgment filed by the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation. The category of water rights is more specifically described in the Landowners' Agreement as "so much of the water rights from the Gila River above the confluence therewith of the Salt River now owned by the United States or said Indians for or on account of or appurtenant to said

Gila River Indian Reservation and the San Carlos Indian Reservation. . . ." *Id.*

The United States may not have pledged all of this Indian water to the San Carlos Project. The language of the Landowners' Agreement continues by qualifying the earlier language, saying "except water rights in that tributary of the Gila River known as the San Carlos River, and except water rights of the United States or of the Indians in the Gila River, which shall be retained by the Secretary of the Interior for the use of the Indians of the said San Carlos Reservation. . . ." *Id.* at 7-8. So, from that larger group of water rights benefiting the Gila River Indian Reservation and the San Carlos Indian Reservation, the San Carlos Apache Tribe argues that water rights benefiting the San Carlos Indian Reservation were withdrawn from the pledge of federally held water rights to the San Carlos Project.

The San Carlos Apache Tribe also uses this language as the basis for its argument that the United States, for itself and in behalf of the Gila River Indian Community and the San Carlos Irrigation and Drainage District, waived any water right claims it might assert to the San Carlos River. They indicate that this waiver has been incorporated into the *Globe Equity Decree*; however, the language referred to by the San Carlos Apache Tribe in its pleading does not directly support this contention. *See* San Carlos Apache Tribe's Motion at 3.

The Gila River Indian Community responds, repeating earlier arguments that the *Globe Equity Decree* is ambiguous; the Community and the San Carlos Apache Tribe were co-parties, not adversaries, in the *Globe Equity* litigation; and

the causes of action are different between the two cases. The United States takes no position on the issue.

I believe the language of the Landowners' Agreement only means that the United States had control over several "pots" of water that it could pledge to the San Carlos Project, *e.g.*, Gila River Indian water rights, San Carlos Indian water rights, and other water rights acquired for the reclamation project. The federal government pledged most of these "pots" of water to the project; but, under the exclusion language discussed, it apparently did not pledge water rights that the San Carlos Apache Tribe might establish in the San Carlos River. What rights the San Carlos Apache Tribe may have in the San Carlos River is beyond the scope of this proceeding concerned, as it is, with the water rights of the Gila River Indian Community.

Rather than resolve the exact implications of the Landowner's Agreement on any Gila River Indian Community's claims to the San Carlos River, I believe the Apache Tribes' motion should be granted for a different but stronger reason. I have already determined that *res judicata* binds the parties and privities to *Globe Equity*, not only as to what was determined by decree in 1935 but also what could have been litigated in that proceeding. *See* discussion pp. 47-59, *supra.* The United States, as a party to *Globe Equity*, and the Gila River Indian Community, as a privity of the United States, can establish no additional rights to the Gila River system against other parties and privities to the *Globe Equity* litigation, including the San Carlos Apache Tribe, beyond those rights set forth in that decree. While they were both represented by the United States in the *Globe Equity*

litigation, there was no lack of adversity between the Gila River Indian Community and the San Carlos Apache Tribe under the U.S. Supreme Court's holding in *Nevada v. United States*, which has been previously discussed. *See* discussion pp. 20-24, *supra.*

B. *Findings of Fact*

1. *Finding of Fact No. 35.* Both the Gila River Indian Community and the San Carlos Apache Tribe are privities of the United States, which represented their interests in the *Globe Equity* litigation.

C. *Conclusions of Law*

1. *Conclusion of Law No. 33.* While they were both represented by the United States in the *Globe Equity* litigation, there was no lack of adversity between the Gila River Indian Community and the San Carlos Apache Tribe under the U.S. Supreme Court's holding in *Nevada v. United States*, 463 U.S. 110, 126 (1983) ("'it matters but little who are plaintiffs and who are defendants in the settlement of cases of this character'").

2. *Conclusion of Law No. 34.* The San Carlos Apache Tribe is entitled to assert that Gila River Indian Community can establish no additional rights to the Gila River system against the San Carlos Apache Tribe beyond those rights set forth in the *Globe Equity Decree.*

D. *Recommendation*

The motion of the San Carlos Apache Tribe *et al.* should be GRANTED since the these Apache Tribes are privity to an original party to the *Globe Equity Decree*, *i.e.*, the United States, and the interests of the Gila River Indian Community and these Apache Tribes were sufficiently adverse in that litigation.

The San Carlos Apache Tribe is entitled to assert that *Globe Equity* was a complete and final adjudication of all claims of the Gila River Indian Community, the members of that Community, and the United States on their behalf, to water (including the water of the San Carlos River) for all purposes appurtenant to the Gila River Indian Reservation (including the lands described as "allotted" and "surplus" in this report).

V. EFFECT OF LANDOWNER AND REPAYMENT AGREEMENTS

> Motion for Summary Judgment filed by the San Carlos Irrigation and Drainage District (Oct. 4, 1999), asserting that the water right claims of the Gila River Indian Community, or on its behalf, are conditioned on certain agreements commonly known as the Florence-Casa Grande Landowners' Agreement, San Carlos Irrigation Project Landowners' Agreement, and the Project Repayment Contract (Docket No. 206).

Appendix E

A. *Introduction*

Because of political and engineering necessities during the early decades of the 20th Century, the San Carlos Project was constructed with common features to serve both Indian and non-Indian agriculture. The joint approach broadened public support for the project and included features that could serve both communities.

One of the first components of the San Carlos Project was the Florence-Casa Grande Project, authorized by Congress in 1916. The legislation called for the construction of two diversion dams on the Gila River and distribution facilities that would later be merged into the larger San Carlos Project. To make the project feasible, the legislation authorized the Secretary of the Interior to enter into contracts with non-Indian farmers whereby these landowners pledged their water rights to the federal government, promised to repay certain of the costs, and suffered liens on their property to secure the debt. In exchange, the Secretary promised to make water rights appurtenant to the Gila River Indian Reservation available to the project, pool the Indian and non-Indian water, and distribute the water according to a percentage formula. The agreements embodying this arrangement are known as the Florence-Casa Grande Project Act Landowners' Agreements. OSM No. 213.

After Congress authorized the construction of Coolidge Dam and San Carlos Reservoir in 1924, 38,000 additional acres were brought into the reclamation project. Once again, the Secretary was authorized to obtain landowners' agreements reciting water distribution and repayment

provisions similar to the earlier Florence-Casa Grande agreements. This second set of agreements is known collectively as the San Carlos Irrigation Project Landowners' Agreements. OSM No. 153.

In 1931, the United States and the San Carlos Irrigation and Drainage District entered into a Repayment Contract whereby the District agreed to repay the costs of the project works including Coolidge Dam, Ashurst-Hayden Dam, and water distribution canals and contribute money toward the ongoing operational and maintenance costs of the system. OSM No. 458 at 6-8, 10-13. This agreement also referred to the common water supply of the project. *Id.* at 4.

The *Globe Equity Decree* makes several references to the Florence-Casa Grande Project Act Landowners' Agreement and appears to incorporate the pooling provisions of that agreement. *E.g.*, art. VII, OSM No. 4.

The San Carlos Irrigation and Drainage District has filed a motion for summary judgment asserting that the Florence-Casa Grande Landowners' Agreement, the San Carlos Irrigation Project Landowners' Agreement, the Repayment Contract, and the *Globe Equity Decree* all recognize and require the pooling arrangement. Thus, it is alleged, "any water rights decreed to GRIC in this Adjudication for any lands within [the San Carlos Project] must be pooled with SCIDD water rights as part of a common Project water supply for use on [San Carlos Project] lands." SCIDD's Motion for Summary Judgment at 2.

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The Gila River Indian Community opposes SCIDD's motion because it believes the question of a pooling arrangement is properly and exclusively before the federal district court as part of the interpretation and enforcement of the *Globe Equity Decree.* The Community further argues that the motion does not satisfy the criteria necessary for summary judgment. The United States agrees (joined by Gila Valley Irrigation District and Franklin Irrigation District on this point) that the question is properly before federal court. Further, the federal government argues, the adjudication court has no subject matter jurisdiction to interpret any contractual obligations concerning a pooling arrangement.

B. *Findings of Fact*

1. *Finding of Fact No. 36.* The federal district court recently considered a similar motion filed by the San Carlos Irrigation and Drainage District. On February 9, 2000, Judge John C. Coughenour upheld the water pooling provisions of the *Globe Equity Decree*, which incorporate the earlier provisions of the Florence-Casa Grande Landowners' Agreements and the San Carlos Irrigation Project Landowners' Agreements.

2. *Finding of Fact No. 37.* In its memorandum decision, the federal court said:

> SCIDD has identified several places in the Decree, including Articles V, VI, and VII, where this formula [providing an approximate division of 60 percent of the water to the Indian Community and 40 percent to the non-Indian farmers of SCIDD]

> is either explained or explicitly referenced. No party presently challenges that this formula has been incorporated as a provision enforceable under the Decree. Accordingly, the Court finds that water called for by these parties should be allocated according to the formula as described in Article VI(3) of the Decree.

Order at 3, *United States v. Gila Valley Irr. Dist.*, Globe Equity No. 59 (D. Ariz. Feb. 9, 2000).

C. *Conclusions of Law*

1. *Conclusion of Law No. 35.* The ruling made by Judge John C. Coughenour on the motion filed by the San Carlos Irrigation and Drainage District in federal court decides the issue presented by SCIDD in this proceeding and moots SCIDD's motion for summary judgment. Since the question presented involves an interpretation of the *Globe Equity Decree*, the question has been properly addressed and answered by the federal court.

2. *Conclusion of Law No. 36.* Once decreed, the abstracts for water rights subject to these water pooling conditions should contain annotations in the "Other Remarks" field to the applicable provisions of the *Globe Equity Decree* and other agreements. This will further the court's interest in making a public record of contractual arrangements or other decrees that affect the use of the public waters of Arizona. The annotations should be confined to comments to this effect. "The water rights adjudicated in this Abstract may be subject to certain water pooling

requirements set forth in the Florence-Casa Grande Landowners' Agreement (1919), San Carlos Irrigation Project Landowners' Agreement (various dates), San Carlos Project Repayment Contract (1931), and *Globe Equity Decree* (1935)."

3. *Conclusion of Law No. 37.* Left unanswered, however, is the question of whether the water pooling agreements apply to additional sources of water potentially adjudicated to project lands in this adjudication. For instance, if the Gila River Indian Community were able to establish additional or improved water rights for its reservation lands within project boundaries (overcoming my earlier determinations of GVID's motion for summary judgment), would this additional water be subject to the water pooling agreements? Once again, this is in the first instance a matter of interpretation and enforcement to be addressed by the federal district court. The question should not be addressed or decided by the adjudication court.

D. *Recommendation*

The motion for summary judgment filed by the San Carlos Irrigation and Drainage District on the question of pooling arrangements should be DENIED as moot as the issue has been decided in SCIDD's favor by the federal district court in its enforcement and administration of the *Globe Equity Decree.*

Once decreed, the abstracts for water rights subject to these water pooling conditions should contain annotations in the "Other Remarks" field to the applicable provisions of the *Globe Equity Decree* and other agreements.

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VI. EFFECT OF WATER RIGHTS SETTLEMENT AND EXCHANGE AGREEMENT

Motion for Summary Judgment filed by ASARCO Incorporated (Oct. 4, 1999), asserting that the water right claims of the Gila River Indian Community, or on its behalf, are conditioned by the Water Rights Settlement and Exchange Agreement (Jan. 1, 1977) and the Consent to Assignment [of the Water Rights Settlement and Exchange Agreement] (April 25, 1993) (Docket No. 202).

A. *Introduction*

Kennecott Copper Corporation held surface water rights in the upper basin of the Gila River system. The water was used in Kennecott's mining and milling operations at Ray and Hayden, Arizona, as well as for some farming along the Gila River. Some of the company's rights were incorporated into the *Globe Equity Decree*, but Kennecott and the Gila River Indian Community apparently disagreed over the nature and extent of their respective water rights.

Kennecott and the Community entered into a Water Rights Settlement and Exchange Agreement in January 1977 to resolve some of these disagreements. OSM No. 158. Under the main features of the agreement, Kennecott was allowed to continue to use its water rights under *Globe Equity*. Kennecott promised to pay $1.5 million in satisfaction of the Community's claims for damages resulting from Kennecott's past use of water in the Gila River system.

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Kennecott could use Gila River system water in excess of its *Globe Equity* rights if it paid liquidated damages to the Community or provided replacement Central Arizona Project water. Thus, the agreement had both forbearance and exchange provisions. The agreement was signed by Kennecott, the Indian Community, and the Secretary and other officials of the Department of Interior. The agreement apparently was not reviewed or approved by any court or other governmental entity.

Kennecott's land and water rights in the Gila River basin were acquired by ASARCO in 1986. On April 25, 1993, the Indian Community signed a Consent to Assignment of the Water Rights Settlement and Exchange Agreement to ASARCO. OSM No. 162. This consent was not signed by Interior Department officials.

ASARCO now seeks a summary determination that the Gila River Indian Community's water rights are conditioned by its obligations to ASARCO under the 1977 Water Rights Settlement Agreement and Exchange Agreement and the 1993 assignment.

The Indian Community opposes the summary judgment request, arguing that it has not waived its sovereign immunity for the interpretation of its contracts, the agreement contains a specific choice of forum provision, and the matter should be addressed in the first instance by the *Globe Equity* court.

Other parties have weighed in against ASARCO's motion for other reasons. The Salt River Project and Tempe suggest that the agreement structures an off-reservation lease of

Indian water which is impermissible without congressional approval and the Consent to Assignment has never been approved by the Department of Interior. The San Carlos Irrigation and Drainage District agrees with these contentions and adds that any federal approval of the agreement could not bind SCIDD. The United States maintains that it was not a party to the 1977 agreement and, therefore, cannot be bound by its terms. The San Carlos Apache Tribe joins in many of these arguments.

ASARCO and the Indian Community both suggest that the agreement has worked well between them although there appears to be some dispute as to whether ASARCO has satisfied its obligations to provide "make-up" CAP water. While problems lurk in the shadows, such as whether the federal government ever approved the agreement, they probably would not threaten the parties' working relationship under the agreement if the matter had not been illuminated by the general stream adjudication's sometimes harsh light.

B. ***Findings of Fact***

1. *Finding of Fact No. 38.* Kennecott Copper Corporation and the Gila River Indian Community entered into a Water Rights Settlement and Exchange Agreement on January 1, 1977, to resolve certain disagreements. The agreement was signed by Kennecott, the Indian Community, and the Secretary and other officials of the Department of Interior. [OSM No. 158].

2. *Finding of Fact No. 39.* Kennecott's land and water rights in the Gila River basin were acquired by

ASARCO in 1986. On April 25, 1993, the Indian Community signed a Consent to Assignment of the Water Rights Settlement and Exchange Agreement to ASARCO. This consent was not signed by Interior Department officials. [OSM No. 162].

3. *Finding of Fact No. 40.* Paragraph 35 of the Water Rights Settlement and Exchange Agreement requires the Indian Community and ASARCO to submit "all actions for the enforcement or interpretation" of the agreement to federal court. The parties waive any immunity they might have to federal court litigation and each relinquishes any right "to have any dispute arising hereunder determined in any state court, tribal court or under tribal law or custom, and covenants that it will not in any manner seek to have this Agreement or its rights or obligations hereunder enforced or adjudicated in any state court, tribal court, or under tribal law." [OSM No. 158, at 30]. In the event a federal court does not agree to hear the dispute, the contracting parties agreed to have the dispute arbitrated.

C. *Conclusions of Law*

ASARCO properly brought its motion for summary judgment after being directed by superior court to identify prior decrees, agreements, or documents that may affect the water rights of the Gila River Indian Community. The identification of the Water Rights Settlement and Exchange Agreement and the Consent to Assignment helps describe the complex weave that is the law of Gila River. While the adjudication court has a strong interest in identifying and publicizing these documents, it has little interest in

gratuitously resolving every conceivable legal problem that may accompany these prior legal arrangements. While the adjudication court is obliged to determine the respective water rights of the Indian Community, United States, ASARCO, and others, it does not need to interpret contracts about the leasing or use of the water under these rights, or the validity of the agreements themselves, until an actual dispute is properly before the court.

The choice of forum provision of the agreement provides the proper basis for deciding ASARCO's motion. Other than to say they are substantial issues, I need not discuss at length the tribal sovereign immunity questions raised by asking the adjudication court to interpret contracts between water users. A similar issue was raised in the Little Colorado River Adjudication, *i.e.*, whether the adjudication court had jurisdiction to interpret provisions of the Navajo Nation Water Code. Among other reasons, I ruled that by filing claims in the adjudication, the Navajo Nation did not waive its immunity to allow a state court to interpret its water code. Report of the Special Master at 19-21, *In re Atkinson's Ltd. of Az. Dba Cameron Trading Post*, No. 6417-34-1 (Little Colorado River Adjudication Sept. 15, 1999); *see also McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989) (tribal action concerning ownership of land is not waiver of immunity for interpretation of lease).

1. *Conclusion of Law No. 38.* The choice of forum provision contained in paragraph 35 of the Water Rights Settlement and Exchange Agreement is dispositive of ASARCO's motion. The paragraph requires the Indian Community and ASARCO to submit "all actions for the

enforcement or interpretation" of the agreement to federal court. The parties waive both any immunity they might have to federal court litigation and each relinquishes any right "to have any dispute arising hereunder determined in any state court, tribal court or under tribal law or custom, and covenants that it will not in any manner seek to have this Agreement or its rights or obligations hereunder enforced or adjudicated in any state court, tribal court, or under tribal law." [OSM No. 158, at 30]. If the federal courts do not agree to hear the dispute, the contracting parties agree to have the dispute arbitrated. The adjudication court should honor this choice of forum provision.

2. *Conclusion of Law No. 39.* To further the interest of the adjudication court in preparing a public record of agreements or arrangements that may affect the use and management of the public waters of the State of Arizona, the appropriate water right abstracts of the Gila River Indian Community and ASARCO, once they are prepared, should be annotated in the "Other Remarks" section with a reference to the Water Right's Settlement and Exchange Agreement and Consent to Assignment. The annotations should be limited to comments of this effect: "The water rights adjudicated in this Abstract may be subject to the Water Rights Settlement and Exchange Agreement between the Gila River Indian Community and Kennecott Copper Corporation, dated January 1, 1977, and the Consent to Assignment [to ASARCO], dated April 25, 1993."

D. *Recommendation*

The motion should be DENIED for the reason that the question presented should be decided by a federal court or an arbitrator selected under the choice of forum provisions contained in the Water Rights Settlement and Exchange Agreement.

The appropriate water right abstracts of the Gila River Indian Community and ASARCO, once they are prepared, should be annotated in the "Other Remarks" section with a reference to the Water Rights Settlement and Exchange Agreement and Consent to Assignment, using language substantially similar to that set forth in Conclusion of Law No. 39.

VII. MOTION FOR APPROVAL OF MASTER'S REPORT AND FOR ENTRY OF PROPOSED ORDER

Based on Findings of Fact, Conclusions of Law, and other discussion set forth in this report, the Special Master recommends the disposition of the pending motions as specifically set forth in the preceding discussion. The Master additionally recommends that these determinations be reflected in subsequent hydrographic survey reports prepared by the Arizona Department of Water Resources.

The Master hereby submits a proposed order effectuating these recommendations. The proposed order appears as Appendix B to this report.

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The Special Master hereby MOVES the Superior Court, under the provisions of Rule 53(h), ARIZONA RULES OF CIVIL PROCEDURE, to adopt his report and enter the proposed order after the appropriate notice has been given.

VIII. NOTICE OF SUBSEQUENT PROCEEDINGS

This report has been filed with the Clerk of the Court and posted to the Special Master's website (http://www.supreme.state.az.us/wm/) on June 30, 2000. Printed copies will be mailed on July 5, 2000.

NOTICE IS HEREBY GIVEN that any claimants in the Gila River adjudication may file an objection to the report on or before **Wednesday, July 26, 2000**.[12] Any responses to objections must be filed with the Clerk of the Court on or before **Wednesday, August 9, 2000**. Objections and responses must be filed with the Clerk of the Superior Court, Maricopa County, 101/201 W. Jefferson St., Phoenix, AZ 85003-2205, Attn: Water Case W1-203. Copies of objections and responses must be served personally or by mail on all persons appearing on the service list for this contested case attached as Appendix C to this report.

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12 The period for filing objections to the report includes the ten-day period, not including intermediate Saturdays, Sundays, and legal holidays, as specified by Rules 6(a) and 53(h), ARIZ. R. CIV. P. The five-day period for filing responses is specified in Rule 4(a), UNIFORM RULES OF PRACTICE. An additional five-day period is required when service has been made by mail (Rule 6(e), ARIZ. R. CIV. P.). Since the report does not cover an entire subwatershed or reservation, but only motions concerning an aspect of the case, the 180-day period prescribed by ARIZ. REV. STAT. ANN. § 45-257(A)(2) (Supp. 1998) does not apply.

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NOTICE IS ALSO GIVEN that the hearing on the Master's motion to approve the report, and any objection to the report, will be taken up at the next scheduled conference or hearing before Judge Bolton held after August 9, 2000, or as otherwise ordered. Rule 53(h) ARIZONA RULES OF CIVIL PROCEDURE, provides that "[t]he court shall accept the master's findings of facts unless clearly erroneous. . . . [and] the court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

RESPECTFULLY SUBMITTED this 30th day of June 2000.

s/ John E. Thorson
JOHN E. THORSON
Special Master

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APPENDIX A

Contested Case No. W1-203
In re the Water Rights of the Gila River Indian Community

INDEX OF ALL PLEADINGS
CONCERNING MOTIONS
HEARD ON APRIL 26, 2000
Docket Numbers in ( )

I. MOTION FOR SUMMARY JUDGMENT (March 1, 1999) filed by Gila Valley Irrigation District, Franklin Irrigation District, San Carlos Irrigation and Drainage District, Salt River Project, and City of Tempe (119).

   A. Joined by: City of Phoenix (125); Cities of Chandler, Glendale, Mesa & Scottsdale (126); City of Goodyear (130); City of Safford (limited joinder) (124); Arizona Public Service Co. (127); BHP Copper Inc. (128); LDS Church (129); Buckeye Irrigation Co. & Arlington Canal Co. (122); Pomerene Water Users Ass'n (limited joinder) (133).

   B. Responses by: San Carlos Apache Tribe (204); Gila River Indian Community (216); United States (232).

   C. Replies by: Gila Valley Irrigation District, Franklin Irrigation District, San Carlos Irrigation & Drainage District, Salt River Project, and City of Tempe (319).

II. MOTION FOR SUMMARY JUDGMENT (March 1, 1999) filed by San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation (118).

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A. Responses by: Gila Valley Irrigation District & Franklin Irrigation District (205) (joined by San Carlos Irrigation and Drainage District (259)); Gila River Indian Community (219).

B. Reply by: San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation (323).

III. MOTION FOR PARTIAL SUMMARY JUDGMENT RE PRECLUSIVE EFFECTS OF PRIOR AGREEMENTS AND DECREES ON WATER RIGHTS OF GILA RIVER INDIAN COMMUNITY (Oct 4, 1999) filed by San Carlos Irrigation and Drainage District (206).

A. Responses by: Gila River Indian Community (272); Gila Valley Irrigation District & Franklin Irrigation District (280); United States (285).

B. Reply by San Carlos Irrigation and Drainage District (300)..

IV. MOTION FOR SUMMARY JUDGMENT REGARDING EFFECT OF PRIOR AGREEMENTS (Oct. 4, 1999) filed by ASARCO Inc. (202).

A. Responses by: Salt River Project & City of Tempe (265); San Carlos Irrigation and Drainage District (268); San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation (271); Gila River Indian Community (275); Gila Valley Irrigation District & Franklin Irrigation District (278); United States (283).

B. Replies by ASARCO Inc. (305, 306, 307, 308, 309, 310).

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APPENDIX B

PROPOSED ORDER

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE

W-1 (Salt)
W-2 (Verde)
W-3 (Upper Gila)
W-4 (San Pedro)
Consolidated

Contested Case No. W1-203

ORDER

THIS MATTER came before the court on the Motion for Summary Judgment filed by the Gila Valley Irrigation District, Franklin Irrigation District, San Carlos Irrigation and Drainage District, Salt River Project, and City of Tempe (Mar. 1, 1999) (Docket No. 119); Motion for Summary Judgment filed by the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation (Mar. 1, 1999) (Docket No. 118); Motion for Summary Judgment filed by the San Carlos Irrigation and Drainage District (Oct. 4, 1999) (Docket No. 206); and Motion for Summary Judgment filed by

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ASARCO Incorporated (Oct. 4, 1999) (Docket No. 202); consideration of these motions having been referred to the Special Master on Feb. 1, 2000; the Master having filed a report with the Clerk of the Court and provided notice as provided by law; the Master having moved the court for an order approving the report and recommendations; and the court having considered the report, objections to the report, and being fully advised;

THE COURT FINDS that notice of the Master's report has been given as required by law and the period for filing objections to the report has passed;

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The motion of the Special Master to approve the report is GRANTED.

2. The court approves and adopts the findings of fact, conclusions of law, and recommended disposition of the pending motions, as set forth in the report.

3. As to the motion filed by the Gila Valley Irrigation District *et al.*, the motion is GRANTED in behalf of original parties to the *Globe Equity Decree*, successors of original parties to the *Globe Equity Decree*, and privities of original parties to the *Globe Equity Decree*. These persons are entitled to assert that *Globe Equity* was a complete and final adjudication of all claims of the Gila River Indian Community, the members of that community, and the United States on their behalf, to water for all purposes appurtenant to the Gila River Indian Reservation, whether allotted or not.

4. Also as to the motion filed by the Gila Valley Irrigation District *et al.*, the motion is GRANTED in behalf of all other claimants in the Gila River system but only to the extent of the lands anticipated in 1935 to be transferred into Indian allotments. For these allotted lands, all other claimants in the Gila River system are entitled to assert that *Globe Equity* was a complete and final adjudication of all claims of the Gila River Indian Community, the members of that community, and the United States on their behalf to water for all purposes appurtenant to the allotted portion of the reservation. An evidentiary hearing is necessary to ascertain whether daims for water for the surplus lands were part of the cause of action asserted by the United States in *Globe Equity*. Until then, the United States and the Community may continue to claim additional water for these surplus lands as against those other claimants in the Gila River system who were not parties to *Globe Equity* or successors or privities thereto.

5. As to the motion filed by the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation, the motion is GRANTED since these Apache Tribes are privity to an original party to the *Globe Equity Decree*, *i.e.*, the United States, and the interests of the Gila River Indian Community and the these Apache Tribes were sufficiently adverse. These Apache Tribes are entitled to assert that *Globe Equity* was a complete and final adjudication of all claims of the Gila River Indian Community, the members of that community, and the United States on their behalf, to water (including the water of the San Carlos River) for all purposes appurtenant to the Gila River Indian Reservation, whether allotted or not.

6. As to the motion filed by the San Carlos Irrigation and Drainage District, the motion should be DENIED for the reason that the question presented is moot as it has been decided in favor of the San Carlos Irrigation and Drainage District by the federal district court in its enforcement and administration of the *Globe Equity Decree.* Once decreed, the abstracts for water rights subject to these water pooling conditions should contain annotations in the "Other Remarks" field to the applicable provisions of the *Globe Equity Decree* and other applicable agreements, using language substantially similar to that recommended by the Master.

7. As to the motion filed by ASARCO, the motion should be DENIED for the reason that the question presented should be decided by a federal court or arbitrator under the choice of forum provisions contained in the Water Rights Settlement and Exchange Agreement. The appropriate water right abstracts of the Gila River Indian Community and ASARCO, once they are prepared, should be annotated in the "Other Remarks" section with a reference to the Water Rights Settlement and Exchange Agreement and Consent to Assignment, using language substantially similar to that recommended by the Master.

IT IS FURTHER ORDERED that the Arizona Department of Water Resources prepare subsequent hydrographic survey reports in accordance with the determinations made in this order.

IT IS FURTHER ORDERED that proceedings continue in this contested case in accordance with this order.

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Dated this ____ day of _____ 2000.

_____
SUSAN R. BOLTON
Judge of the Superior Court

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED MAY 2, 1983 AND FILED MAY 9, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Globe Equity No. 59

UNITED STATES, et al.,

Plaintiffs,

v.

GILA VALLEY IRRIGATION DISTRICT, et al.,

Defendants.

ORDER

The Gila River Indian Community ("GRIC") on behalf of itself and its members moves, pursuant to Fed. R. Civ. P. 24(a)(2), for leave to intervene as plaintiffs in this action. Along with its motion, GRIC tenders a proposed complaint. In order to grant the motion, I must decide that GRIC's motion is timely, that GRIC claims an interest related to the *res* of the action or that GRIC is so situated that the disposition of the action may impair or impede GRIC's interests, and that GRIC is inadequately represented by any other party to the action. Fed. R. Civ. P. 24(a)(2). I conclude that the motion to intervene should be GRANTED, but only for the limited purpose set out below.

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This case was filed in 1925, and resulted in the entry of a consent decree ten years later. The decree apportions water among all users, Indian and non-Indian, of Gila River water from the Duneau-Verden Valley to the Gila River Indian Reservation. The court has retained jurisdiction over the case all the intervening years for the sole purpose of administering the decree, "this decree otherwise being deemed a final determination of the issues in the cause and of the rights herein defined." Decree of June 29, 1935, Section XIII.

A preliminary issue wants attention before I rule on the merits of the motion. As certain of the defendants that oppose the motion point out, this is not the first time that the tribes represented by GRIC have sought leave to intervene in the action. The tribes sought to do so in 1935, and the court denied their motion. The tribes did not appeal. The defendants contend, citing *Cheyene River Sioux Tribe v. United States*, 338 F.2d 906 (8th Cir. 1964), *cert. denied*, 382 U.S. 815 (1965), that the failure of the tribes to appeal the denial of the 1935 motion to intervene ought to preclude the tribes from raising the issue again now.

True, *Cheyenne River* provides some authority for denying leave to intervene. It could be applied if a party seeks to intervene to vacate a judgment, but has not appealed from the denial of a previous motion to intervene that was decided before the judgment was entered. Nevertheless, there is also authority that permits a court to entertain subsequent motions to intervene based on changed circumstances. *See Calvert Fire Insurance Co. v. Environs Development Corp.* 601 F.2d 851, 857-59 n. 3 (5th Cir. 1979); *Hirshhorn v. Mine Safety Appliance Co.*, 101 F. Supp. 549, 555 (W.D. Pa. 1951).

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As I shall discuss below, I have decided not to permit GRIC to intervene for the purpose of vacating the Decree or relitigating the issues resolved by the Decree. Accordingly, the *Cheyenne River* case is not on point. In light of the tribes' failure to appeal the 1935 denial of their motion to intervene, however, I will not consider any circumstances that otherwise would be relevant to deciding the motion, if those circumstances relate to events occurring before 1935. *See Hirshhorn*, 101 F. Supp. at 555.

TIMELINESS

To the extent GRIC seeks to set aside the Decree or to relitigate the issues resolved by the Decree, its motion is not timely and will be DENIED. Courts look to three factors to determine timeliness: (1) the stage of the proceeding; (2) the prejudice to other parties; and (3) the reason for and length of the delay. *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978). Intervention after the entry of a consent decree is reserved for exceptional cases and if intervention is sought, then the court is to weigh the first factor heavily against the intervenor. *Id.* In evaluating the second factor, courts have recognized the seriousness of prejudice that can result if a decree is already being fulfilled and the intervenor seeks to counter-mand it. *Id.* In such situations, permitting intervention can "create havoc" and delay needed relief. *Id.* To prevail, therefore, an intervenor must convincingly explain the delay. *Id.*

GRIC's motion comes forty-seven years after the entry of a final decree in the case. To the extent GRIC seeks to vacate the Decree or to relitigate the issues the Decree

resolves, it is hard to imagine a more untimely motion. The prejudice to the parties that is posed by GRIC's avowed intent at this late date to dismantle the Decree is manifest. Water is lifeblood to the land affected by the Decree and the Decree apportions much of the available water. To permit an attack now on the Decree would cast the apportionment of Gila River water into a legal limbo, perhaps of many years duration, that would be detrimental to the interests of all the parties to the Decree.

GRIC does not make any attempt to give reasons for the extraordinary length of their delay. Perhaps as was done in *United States v. Alpine Land and Reservoir Company*, 431 F.2d 763 (9th Cir. 1970), *cert. denied*, 401 U.S. 909 (1971), GRIC would argue that their status as Indians prevented them from intervening sooner. I note, however, that the *Alpine Land* decision rejected this kind of argument and affirmed the trial court's denial of a tribe's motion to intervene. The motion was made in a case which, like this one was filed in 1925 and had resulted in the entry of a consent decree. The tribe sought to relitigate the issues settled by the decree and contended that its motion should be deemed timely because the tribe, along with other Indian tribes, first had gained the right to sue in its own behalf in 1966 through the passage of a federal statute. The Court of Appeals rejected the argument and stated that the timely application requirement of Rule 24 applies to Indians just as it does to other litigants. Thus, if GRIC had made the argument, under *Alpine Land*, I would have rejected it. GRIC does not offer any other excuse for its delay, so I must deem the motion untimely to the extent GRIC seeks to set aside the Decree or to relitigate the issues that the Decree resolves.

To the extent, however, that GRIC seeks leave to intervene in order to be able to enforce proper administration of the Decree, I conclude that the motion is timely. The court has retained jurisdiction over the case in order to insure proper administration of the Decree. Accordingly, any time a party in good faith believes that the Decree is not being properly enforced, a proceeding to enforce the Decree probably would be timely. The record shows that various enforcement proceedings based on the Decree have arisen at occasional intervals since 1935. It follows, therefore, that a motion to intervene by a non-party, for the purpose of filing an enforcement action also can be deemed timely.

The parties to the Decree cannot complain of any prejudice to the extent GRIC only seeks proper enforcement of the Decree. Presumably, proper enforcement of the Decree will benefit all water users affected by the Decree. GRIC does not address the reasons for its delay, but I think it a safe assumption that GRIC has not felt the need to bring an action for proper enforcement until now. My conclusion that intervention is timely to seek enforcement of the Decree but not to relitigate the Decree is consistent with the recent decision in *Arizona v. California*, __ U.S. __ 51 U.S.L.W. 4325, 4328 (March 30, 1983).

INTEREST

I have concluded above that GRIC's motion is not timely to the extent GRIC seeks to vacate the Decree or to litigate issues decided by the Decree. Therefore, I need not consider whether GRIC could show, for this aspect of its motion, whether it has an interest that will be impaired or impeded

absent this kind of interventions I would comment, however, that I doubt GRIC could sustain its burden.

The Decree itself is an accomplished fact, and since 1935 has represented a final adjudication of certain rights that Indian and non-Indian users claimed in the Gila River waters. To the extent GRIC may wish to assert rights other than those litigated in the Decree, those rights, if any, cannot be impaired or impeded by the continued existence of the Decree. The Decree, by definition, would not affect such rights. GRIC could not, therefore, sustain its burden on this issue.

To the extent that GRIC seeks to enforce the Decree, however, Globe Equity No. 59 is still very much alive. The court retained jurisdiction to enforce the Decree. The continued viability of this aspect of the case is demonstrated by the currently pending action of the United States to enforce the Decree. The ongoing enforcement of the Decree naturally has an impact on GRIC's rights under the Decree. Undoubtedly, therefore, GRIC has rights to the water that is the subject of Globe Equity No. 59 that may be impaired or impeded if the Decree is improperly administered.

ADEQUACY OF PRESENT REPRESENTATION

I have concluded above that GRIC's motion is not timely to the extent GRIC seeks to vacate or relitigate what was done in 1935. I need not consider, therefore, whether GRIC could show, for this aspect of its motion, that the representation by the United States of its interest is or was inadequate. I would note, however, that if I were to take a look at the adequacy of representation for the purposes of

permitting GRIC to relitigate or vacate, the relevant time period would be the representation up to and including the entry of the Decree. The failure of GRIC to appeal from the first denial of its motion to intervene, however, would prevent me from considering these facts. It is too late in the day for GRIC now to complain of its representation back in 1935.

To the extent GRIC seeks leave to intervene to enforce the Decree, however, the motion presents a knottier problem. GRIC contends that due to various conflicts of interest the United States cannot adequately represent it in this proceeding. The United States denies that it has inadequately represented GRIC but argues, on behalf of allowing the motion, that differences possibly may develop between the positions of the government and GRIC about enforcement, and that, therefore, I should permit intervention. Certain of the defendants argue that the United States has not been remiss in protecting GRIC's rights, and they point to four separate enforcement suits that the United States has brought to enforce GRIC's rights. Defendants also cite *Gila River Indian Community v. United States*, 684 F.2d 852, 865 (Ct. Cl. 1982), which reviews the history of the litigation and concludes that representation was adequate.

Upon reviewing the parties' contentions in light of the relevant case law, I conclude that for the purposes of Fed. R. Civ. P. 24(a)(2), GRIC has made a sufficient showing of inadequate representation. As the court recently stated in *Arizona v. California*, 51 U.S.L.W. at 4328, in reviewing certain exceptions taken to the Special Master's Report, it was proper to permit intervention in this kind of case because the Indians ought to be allowed "to take their place as

independent qualified members of the modern body politic" and their "participation in litigation critical to their welfare should not be discouraged" (citations omitted). The court, therefore, agreed with the Special Master that the motions to intervene ought to be granted.

The Memorandum and Report on Preliminary Issues of Special Master Elbert P. Tuttle, of August 8, 1979, that the court reviewed *in Arizona v. California* states at page 12:

> "[e]ven though the United States may be satisfying its trust obligations adequately, the Indians have a complaint about their lawyer. In general, the Tribes are probably the best judges of the adequacy of representation of their interest."

Because both GRIC and the United States agree that there are or may be grounds for disagreement between them in this case, and because they are the best judges of their relationship, the conclusion is inescapable that GRIC has shown that for the purposes of Fed. R. Civ. P. 24(a)(2), it is inadequately represented.

Because GRIC has shown that to the extent it seeks leave to intervene to enforce the Decree that its motion is timely, that it claims an interest related to the *res* of the action and is so situated that further disposition of the action may impair or impede its interests, and that it is inadequately represented by any other party to the action, the motion to intervene is GRANTED. The granting of the motion, however, is subject to the condition that any complaint that GRIC files in the

action must seek only to enforce the Decree and not to vacate the Decree or to relitigate issues already determined by the Decree.

IT IS SO ORDERED.

DATED this 2nd day of May, 1983.

s/ [illegible]
United States District Judge

APPENDIX G — OPINION OF THE SUPREME COURT OF THE UNITED STATES IN *ARIZONA, et al. v. SAN CARLOS APACHE TRIBE OF ARIZONA, et al.* DECIDED JULY 1, 1983

SUPREME COURT OF THE UNITED STATES

No. 81-2147

ARIZONA *et al.*

v.

SAN CARLOS APACHE TRIBE OF ARIZONA *et al.*

Argued March 23, 1983.
Decided July 1, 1983.*

OPINION

Justice BRENNAN delivered the opinion of the Court.

These consolidated cases form a sequel to our decision in *Colorado River Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). That case held that (1) the McCarran Amendment, 43 U.S.C. § 666, which waived the sovereign immunity of the United

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* Together with *Arizona et al. v. Navajo Tribe of Indians et al.* (see this Court's Rule 19.4), and No. 81-2188, *Montana et al. v. Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation et al.*, also on certiorari to the same court.

States as to comprehensive state water rights adjudications,[1] provides state courts with jurisdiction to adjudicate Indian water rights held in trust by the United States, and (2) in light of the clear federal policies underlying the McCarran Amendment, a water rights suit brought by the United States in federal court was properly dismissed in favor of a concurrent comprehensive adjudication reaching the same issues in Colorado state court. The questions in this case are parallel: (1) What is the effect of the McCarran Amendment in those States which, unlike Colorado, were admitted to the Union subject to federal legislation that reserved "absolute jurisdiction and control" over Indian lands in the Congress of the United States? (2) If the courts of such States do have jurisdiction to adjudicate Indian water rights, should concurrent federal suits brought by Indian tribes, rather than by the United States, and raising only Indian claims, also be subject to dismissal under the doctrine of *Colorado River?*

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1. The McCarran Amendment provides in relevant part:

"(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. . . ."

Appendix G

I

Colorado River arose out of a suit brought by the Federal Government in the United States District Court for the District of Colorado seeking a declaration of its rights, and the rights of a number of Indian tribes, to waters in certain rivers and their tributaries located in one of the drainage basins of the State of Colorado. In the suit, the Government asserted reserved rights, governed by federal law,[2] as well as rights based on state law. Shortly after the federal suit was commenced, the United States was joined, pursuant to the McCarran Amendment, as a party in the ongoing state-court comprehensive water adjudication being conducted for the same drainage basin. The Federal District Court, on motion of certain of the defendants and intervenors, dismissed the federal suit, stating that the doctrine of abstention required deference to the state proceedings. The Court of Appeals reversed the District Court, and we in turn reversed the Court of Appeals.

We began our analysis in *Colorado River* by conceding that the District Court had jurisdiction over the federal suit under 28 U.S.C. § 1345, the general provision conferring district court jurisdiction over most civil actions brought by the Federal Government. We then examined whether the federal suit was nevertheless properly dismissed in view of the concurrent state-court proceedings. This part of the analysis began by considering "whether the McCarran Amendment provided consent to determine federal reserved

2. See generally *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963); *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908).

rights held on behalf of Indians in state court," 424 U.S., at 809, 96 S.Ct., at 1242, since "given the claims for Indian water rights in [the federal suit], dismissal clearly would have been inappropriate if the state court had no jurisdiction to decide those claims." *Ibid.* We concluded:

"Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions. [*United States v. District Court for Eagle County*, 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971),] rejected the conclusion that federal reserved rights in general were not reached by the Amendment for the reason that the Amendment '[deals] with an all-inclusive statute concerning "the adjudication of rights to the use of water of a river system." ' *Id.*, at 524, 91 S.Ct., at 1002. This consideration applies as well to federal water rights reserved for Indian reservations." 424 U.S., at 810, 96 S.Ct., at 1242.

In sum, considering the important federal interest in allowing all water rights on a river system to be adjudicated in a single comprehensive state proceeding, and "bearing in mind the ubiquitous nature of Indian water rights in the Southwest," it was clear to us "that a construction of the Amendment excluding those rights from its coverage would enervate the Amendment's objective." *Id.*, at 811, 96 S.Ct., at 1243.

We buttressed this conclusion with an examination of the legislative history of the McCarran Amendment. We also noted:

> "Mere subjection of Indian rights to legal challenge in state court . . . would no more imperil

> those rights than would a suit brought by the Government in district court for their declaration. . . . The Government has not abdicated any responsibility fully to defend Indian rights in state court, and Indian interests may be satisfactorily protected under regimes of state law. The Amendment in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights. Moreover, as *Eagle County* said, 'questions [arising from the collision of private rights and reserved rights of the United States], including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed [by the Supreme Court] after final judgment by the Colorado court.' 401 U.S., at 526, 91 S.Ct., at 1003." 424 U.S., at 812-813, 96 S.Ct., at 1243-1244 (citations omitted).

We then considered the dismissal itself. We found that the dismissal could not be supported under the doctrine of abstention in any of its forms, but that it was justified as an application of traditional principles of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Id.*, at 817, 96 S.Ct., at 1246, quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952). We stated that, although the federal courts had a "virtually unflagging obligation . . . to exercise the jurisdiction given them,"424 U.S., at 817, 96 S.Ct., at 1246, there were certain very limited circumstances outside the abstention context in which dismissal was

warranted in deference to a concurrent state court suit. See generally *id.*, at 817-819, 96 S.Ct., at 1246-1247; *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. __ __, __ - __, 103 S.Ct. 927, 938-939, 74 L.Ed.2d 765 (1983). In the case at hand, we noted the comprehensive nature of the state proceedings and the considerable expertise and technical resources available in those proceedings, 424 U.S., at 819-820, 96 S.Ct., at 1247-1248. We concluded:

> "[A] number of factors clearly counsel against concurrent federal proceedings. The most important of these is the McCarran Amendment itself. The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." *Id.*, at 819, 96 S.Ct., at 1247 (citations omitted).

For these reasons, and others,[3] we affirmed the judgment of the District Court dismissing the federal complaint.

II

The two petitions considered here arise out of three separate consolidated appeals that were decided within three days of each other by the same panel of the Court of Appeals for the Ninth Circuit. In each of the underlying cases, either the United States as trustee or certain Indian tribes on their own behalf, or both, asserted the right to have certain Indian water rights in Arizona or Montana adjudicated in federal court.

The Montana Cases (No. 81-2188)

In January 1975, the Northern Cheyenne Tribe brought an action in the United States District Court for the District of Montana seeking an adjudication of its rights in certain streams in that State. Shortly thereafter, the United States brought two suits in the same Court, seeking a determination of water rights both on its own behalf and on behalf of a number of Indian Tribes, including the Northern Cheyenne, in the same streams. Each of the federal actions was a general adjudication which sought to determine the rights *inter sese*

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3. The other factors were the apparent absence at the time of dismissal of any proceedings in the District Court other than the filing of the complaint, the extensive involvement of state water rights in the suit, the 300-mile distance between the federal District Court in Denver and the state tribunal, and the Government's apparent willingness to participate in other comprehensive water proceedings in the state courts.

of *all* users of the stream, and not merely the rights of the plaintiffs. On motion of the Northern Cheyenne, its action was consolidated with one of the Government actions. The other concerned Tribes intervened as appropriate.

At about the time that all this activity was taking place in federal court, the State of Montana was preparing to begin a process of comprehensive water adjudication under a recently passed state statute. In July 1975, the Montana Department of Natural Resources and Conservation filed petitions in state court commencing comprehensive proceedings to adjudicate water rights in the same streams at issue in the federal cases.

Both sets of contestants having positioned themselves, nothing much happened for a number of years. The federal proceedings were stayed for a time pending our decision in *Colorado River.* When that decision came down, the State of Montana, one of the defendants in the federal suits, brought a motion to dismiss, which was argued in 1976, but not decided until 1979. Meanwhile, process was completed in the various suits, answers were submitted, and discovery commenced. Over in the state courts, events moved even more slowly, and no appreciable progress seems to have been made by 1979.

In April 1979, the United States brought four more suits in federal court, seeking to adjudicate its rights and the rights of various Indian tribes in other Montana streams. One month later, the Montana legislature amended its water adjudication procedures "to expedite and facilitate the adjudication of existing water rights." Act to Adjudicate Claims of Existing

Water Rights in Montana, § 1(1), 1979 Mont.Laws 1901. The legislation provided for the initiation of comprehensive proceedings by order of the Montana Supreme Court, the appointment of water judges throughout the State, and the consolidation of all existing actions within each water division. It also provided, among other things, that the Montana Supreme Court should issue an order requiring all claimants not already involved in the state proceedings, including the United States on its own behalf or as trustee for the Indians, to file a statement of claim with the Department of Natural Resources and Conservation by a date set by the court or be deemed to have abandoned any water rights claim. *Id.*, § 16, 1979 Mont.Laws, at 1906-1907, codified at Mont.Code Ann. § 85-2-212 (1981).[4] The Montana court issued the required order, and the United States was served with formal notice thereof.[5]

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4. The statute required that the filing period established by the Montana Supreme Court be no less than one year, and that it be subject to extension, but not beyond June 30, 1983. Mont.Code Ann. § 85-2-212(2) (1981). In 1981, the statute was amended to exempt from the filing deadline Indian claims being negotiated with the Montana Reserved Water Rights Compact Commission. Ch. 268, § 4, 1981 Mont. Laws 393, codified at Mont. Code Ann. § 85-2-217 (1981).

5. The Montana Supreme Court set an original filing deadline of January 1, 1982, App. to Pet. for Cert. in No. 81-2188, pp. 138-139, and then extended the deadline to April 30, 1982, *id.*, at 140-141. The United States apparently made protective filings by the deadline on behalf of all the Montana Tribes. Brief for Montana 32. Two of the Indian Tribes apparently filed statements of claim of their own, and five apparently are negotiating with the Montana Reserved Water Rights Compact Commission, see n. 4, *supra*.

Appendix G

In November 1979, the two judges for the District of Montana jointly considered the motions to dismiss in each of the federal actions,[6] and granted each of them. 484 F.Supp. 31 (D.C.1979). The court relied strongly on the new Montana legislation, stating:

"The above-cited sections reflect both the policy and the essential mechanism for adjudication of water rights. Adjudication by adversary proceeding initiated by one claimant against all others in his drainage has been forsaken in favor of blanket adjudication of *all* claims, including federal and federal trust claims. . . . It is clear that the adjudication contemplated by the [1979 legislation] is both comprehensive and efficient. As the general adjudication has been initiated by the Montana Supreme Court, it would seem that the greater wisdom lies in following *Colorado River*, and, on the basis of wise judicial administration, deferring to the comprehensive state proceedings." *Id.*, at 35-36.

The District Court also noted, among other things, that the federal proceedings "are all in their infancy; service of process has been but recently completed," *id.*, at 36, that the state forums were geographically more convenient to the parties, that "[t]he amount of time contemplated for completion of the state adjudication is significantly less than would be necessary for federal adjudication, insofar as the state has provided a special court system solely devoted to water rights adjudication," *ibid.*, and that "[t]he possibility of conflicting adjudications by the concurrent forums . . . looms large and could be partially avoided only by staying

6. See generally C. Wright, Law of Federal Courts 9 (4th ed. 1983).

the pending state adjudication, an action *Colorado River* has intimated is distinctly repugnant to a clear state policy and purpose." *Ibid.*

On appeal, a divided Court of Appeals reversed. *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (CA9 1982). First, it held that Montana, unlike Colorado, might well lack jurisdiction to adjudicate Indian claims in state court. The court reached this conclusion on the basis of two closely linked documents: the Enabling Act under which Montana was admitted to statehood, and the Montana Constitution promulgated in response to that Enabling Act, both of which provide, in identical terms, that the people inhabiting Montana

> "agree and declare that they forever disclaim all right and title to . . . all lands . . . owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . ." Enabling Act of Feb. 22, 1889, § 4, 25 Stat. 677 (North Dakota, South Dakota, Montana, and Washington); Montana Const. Ordinance I.

The Court of Appeals concluded that, by their terms, the Enabling Act and constitutional disclaimer prohibit Montana from exercising even adjudicatory jurisdiction over Indian water rights, and that the McCarran Amendment effected no

change in that disability. It also held, however, that the State might have acquired such jurisdiction under Public L. 83-280, 67 Stat. 588 (1953) (Public Law 280), which, from 1953 until its amendment in 1968, allowed any State that wished to do so to acquire certain aspects of civil and criminal jurisdiction over Indian affairs, and authorized States with constitutional or statutory disclaimers to "amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment" to the assumption of such jurisdiction. *Id.*, § 6, 67 Stat. 590. See generally *Washington v. Yakima Indian Nation*, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979). The court did not decide whether Montana had amended its constitution in accordance with the requirements of Public Law 280, cf. *Yakima Indian Nation*, *supra*, at 478-493, 99 S.Ct., at 750-757, but it criticized the District Court for not undertaking such an analysis.

The second, and dispositive, ground of decision in the Court of Appeals, however, was its conclusion that "[e]ven if we were to find that Montana had validly repealed the disclaimer language in its constitution, . . . [t]he limited factual circumstances of [*Colorado River*] prevent its application to the Montana litigation. 668 F.2d, at 1087. In reaching this conclusion, the court relied in part on the infancy of both the federal and state proceedings in the Montana litigation, the possible inadequacy of the state proceedings (which it did not discuss in great detail), and the fact that the Indians (who could not be joined involuntarily in the state proceedings) might not be adequately represented by the United States in state court in light of conflicts of interest between the Federal Government's responsibilities as trustee and its own claims to water.

Appendix G

The Arizona Cases (No. 81-2147)

In the mid-1970s, various water rights claimants in Arizona filed petitions in state court to initiate general adjudications to determine conflicting rights in a number of river systems. In early 1979, process was served in one of the proceedings on approximately 12,000 known potential water claimants, including the United States. In July 1981, process was served in another proceeding on approximately 58,000 known water claimants, again including the United States. In each case, the United States was joined both in its independent capacity and as trustee for various Indian tribes.

In March and April of 1979, a number of Indian tribes whose rights were implicated by the state water proceedings filed a series of suits in the United States District Court for the District of Arizona, asking variously for removal of the state adjudications to federal court, declaratory and injunctive relief preventing any further adjudication of their rights in state court, and independent federal determinations of their water rights. A number of defendants in the federal proceedings filed motions seeking remand or dismissal. The District Court, relying on *Colorado River*, remanded the removed actions, and dismissed most of the independent federal actions without prejudice. 484 F.Supp. 778 (D.C.1980).[7] It stayed one of the remaining actions pending the completion of state proceedings. App. to Pet. for Cert. in No. 81-2147, p. D-1.

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7. Two of the actions are in abeyance, apparently pending completion of service of process.

The Tribes appealed from these decisions, with the exception of the remand orders.[8] The Court of Appeals reversed, holding that the Enabling Act under which Arizona was admitted to statehood, 36 Stat. 557 (1910), and the Arizona Constitution, Art. 20, ¶ 4, both of which contain wording substantially identical to the Montana Enabling Act and Constitution, disabled Arizona from adjudicating Indian water claims. *San Carlos Apache Tribe v. Arizona*, 668 F.2d 1093 (CA9 1982); *Navajo Nation v. United States*, 668 F.2d 1100 (CA9 1982). The court remanded to the District Court to determine whether Arizona nevertheless "properly asserted jurisdiction pursuant to Public Law 280." 668 F.2d, at 1098, see 668 F.2d, at 1102. The court did not decide whether, if the State had properly asserted jurisdiction, dismissal would have been proper under *Colorado River*, except to note that "the district judge did not make findings on this issue and the record indicates significant differences between these cases and [*Colorado River*]." 668 F.2d, at 1098, see 668 F.2d, at 1102.

We granted certiorari, __ U.S. __, 103 S.Ct. 50, 74 L.Ed.2d 56 (1982), in order to resolve a conflict among the circuits regarding the role of federal and state courts in adjudicating Indian water rights.[9] We now reverse.

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8. The stay order was certified for interlocutory appeal under 28 U.S.C. § 1292(b). See also *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. __ __, __, 103 S.Ct. 927, 933, 74 L.Ed.2d 765 (1983) (upholding appealability of similar stay order under 28 U.S.C. § 1291).

9. In *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (CA 10 1979), the Court of Appeals for the Tenth Circuit held that the Enabling Act under which New Mexico was admitted to the Union

(Cont'd)

Appendix G

III

A

At the outset of our analysis, a number of propositions are clear. First, the federal courts had jurisdiction here to hear the suits brought both by the United States and the Indian tribes.[10]

(Cont'd)

(whose language is essentially the same as the Enabling Acts at issue in this case) did not bar state jurisdiction over Indian water rights, and upheld the district court's dismissal of a general water adjudication brought in federal court by the Jicarilla Apache Tribe.

10. The primary ground of jurisdiction for the suits brought by the United States is 28 U.S.C. § 1345. The primary ground of jurisdiction for the suits brought by the Indians is 28 U.S.C. § 1362, which provides in relevant part: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." Section 1362 was passed in 1966 in order to give Indian tribes access to federal court on federal issues without regard to the $10,000 amount-in-controversy requirement then included in 28 U.S.C. § 1331, the general federal question jurisdictional statute. Congress contemplated that § 1362 would be used particularly in situations in which the United States suffered from a conflict of interest or was otherwise unable or unwilling to bring suit as trustee for the Indians, and its passage reflected a congressional policy against relegating Indians to state court when an identical suit brought on their behalf by the United States could have been heard in federal court. See S.Rep. No. 1507, 89th Cong., 2d Sess. 2-3 (1966); H.Rep. No. 2040, 89th Cong., 2d Sess. 2, 4 (1966), U.S.Code Cong. & Admin.News 1966, p. 3145. Just as the McCarran Amendment did not do away with federal jurisdiction over water rights claims brought under § 1345, *Colorado River*, 424 U.S., at 806-809, 96 S.Ct., at 1240-1242, there is no reason to think that it limits the jurisdictional reach of § 1362.

Second, it is also clear in this case, as it was in *Colorado River*, that a dismissal or stay of the federal suits would have been improper if there was no jurisdiction in the concurrent state actions to adjudicate the claims at issue in the federal suits. 424 U.S., at 800, 96 S.Ct., at 1236. Third, the parties here agree that the Court of Appeals erred in believing that, in the absence of state jurisdiction otherwise, Public Law 280 would have authorized the States to assume jurisdiction over the adjudication of Indian water rights. To the contrary, Public Law 280 specifically withheld from state courts jurisdiction to adjudicate ownership or right to possession "of any real or personal property, *including water rights*, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States." 25 U.S.C. § 1322(b) (emphasis added); see 28 U.S.C. § 1360(b).[11] Thus, the presence or absence of jurisdiction must rise or fall without reference to whether the States have assumed jurisdiction under Public Law 280.

Finally, it should be obvious that, to the extent that a claimed bar to state jurisdiction in these cases is premised on the respective state Constitutions, that is a question of state law over which the state courts have binding authority. Because, in each of these cases, the state courts have taken jurisdiction over the Indian water rights at issue here, we must assume, until informed otherwise, that-at least insofar

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11. As we explained in *Colorado River*, however, these provisions "only qualif[y] the import of the general consent to state jurisdiction given by [Public Law 280, and] . . . [do] not purport to limit the special consent to jurisdiction given by the McCarran Amendment." 424 U.S., at 812-813, n. 20, 96 S.Ct., at 1243-1244 n. 20.

as state law is concerned-such jurisdiction exists. We must therefore look, for our purposes, to the federal enabling acts and other federal legislation, in order to determine whether there is a federal bar to the assertion of state jurisdiction in these cases.

B

That we were not required in *Colorado River* to interpret the McCarran Amendment in light of any statehood enabling act was largely a matter of fortuity, for Colorado is one of the few Western States that were not admitted to the Union pursuant to an enabling act containing substantially the same language as is found in the Arizona and Montana Enabling Acts.[12] Indeed, a substantial majority of Indian land-including most of the largest Indian reservations-lies in States subject to such enabling acts.[13] Moreover, the reason that Colorado was not subject to such an enabling act, and Arizona and Montana were, has more to do with historical timing than with deliberate congressional selection. Colorado was admitted to the Union in 1876. In 1882, this Court held in

12. See Enabling Act of Feb. 22, 1889, § 4, 25 Stat. 677 (North Dakota, South Dakota, Montana, and Washington); Enabling Act of July 16, 1894, § 3, 28 Stat. 108 (Utah); Enabling Act of June 16, 1906, § 3, 34 Stat. 270 (Oklahoma); Enabling Act of June 20, 1910, §§ 2, 20, 36 Stat. 558-559, 569 (New Mexico and Arizona); Enabling Act of July 7, 1958, § 4, 72 Stat. 339, as amended by Pub.L. No. 86-70, § 2(a), 73 Stat. 141 (Alaska). Idaho and Wyoming, which were both admitted to statehood in 1890 without prior enabling acts, nevertheless inserted disclaimers in their state constitutions. See Idaho Const., Art. 21, § 19; Wyoming Const., Art. 21, § 26.

13. See Brief for the United States 12, and sources cited.

United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869, that the federal courts in Colorado had no criminal jurisdiction in a murder committed by one non-Indian against another on an Indian reservation, pointing out that the case did not concern "the punishment of crimes committed by or against Indians, the protection of the Indians in their improvements, or the regulation by Congress of the alienation and descent of property and the government and internal police of the Indians." *Id.*, at 624, 26 L.Ed. 869. We also suggested, however, that the result might have been different if Congress had expressly reserved all criminal jurisdiction on Indian reservations when Colorado was admitted to the Union, pointing to a similar disclaimer contained in the legislation by which Kansas was admitted to statehood in 1861. *Id.*, at 623-624, 26 L.Ed. 869; see *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 18 L.Ed. 667 (1866). Probably in response to the *McBratney* decision, Congress resumed the practice of including reservations in enabling acts, and did so in the case of virtually every State admitted after 1882. See n. 12, *supra.*

Despite *McBratney* and *The Kansas Indians*, the presence or absence of specific jurisdictional disclaimers has rarely been dispositive in our consideration of state jurisdiction over Indian affairs or activities on Indian lands. In *Draper v. United States*, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896), for example, this Court held that, despite the jurisdictional reservation in the Montana Enabling Act, a federal court still did not have jurisdiction over a crime committed on an Indian reservation by one non-Indian against another. We stated:

> "As equality of statehood is the rule, the words relied on here to create an exception cannot be

> construed as doing so, if, by any reasonable meaning, they can be otherwise treated. The mere reservation of jurisdiction and control by the United States of 'Indian lands' does not of necessity signify a retention of jurisdiction in the United States to punish all offenses committed on such lands by others than Indians or against Indians." *Id.*, at 244-245, 17 S.Ct., at 108-109.

Similarly, in *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), we held that a reservation in the Alaska Enabling Act did not deprive the State of the right to regulate Indian fishing licensed by the Department of the Interior, finding that the state regulation neither interfered with Indian self-government nor impaired any right granted or reserved by federal law. Conversely, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832), perhaps the most expansive declaration of Indian independence from state regulation ever uttered by this Court, pertained to one of the original thirteen States, unbound by any enabling act whatsoever. See also, *e.g.*, *The New York Indians*, 72 U.S. (5 Wall.) 761, 769-770, 18 L.Ed. 708 (1867) (reaching same conclusion as *The Kansas Indians*, *supra*, but without benefit of disclaimer). And our many recent decisions recognizing crucial limits on the power of the States to regulate Indian affairs have rarely either invoked reservations of jurisdiction contained in statehood enabling acts by anything more than a passing mention or distinguished between disclaimer States and nondisclaimer States. See, *e.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. __, 103 S.Ct. 2378, 75 L.Ed.2d __ (1983); *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 102 S.Ct. 3394,

73 L.Ed.2d 1174 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Bryan v. Itasca County*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

In light of this history, the parties in this case have engaged in a vigorous debate as to the exact meaning and significance of the Arizona and Montana Enabling Acts.[14] We need not resolve that debate, however, nor need we resort to the more general doctrines that have developed to chart the limits of state authority over Indians, because we are convinced that, whatever limitation the Enabling Acts or federal policy may have originally placed on state court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment.[15] Cf. *Washington v. Yakima Indian Nations*, 439 U.S. 463, 484-493, 99 S.Ct. 740, 753-757, 58 L.Ed.2d 740 (1979). Congress clearly would have had the right to distinguish between disclaimer and nondisclaimer States in passing the McCarran Amendment. But the Amendment was designed to deal with a general

14. The United States, alone among the respondents, agrees that, in light of the McCarran Amendment, the enabling acts at issue here do not pose an obstacle to state jurisdiction to adjudicate Indian water rights. Brief for the United States 11-15.

15. Because we do not construe the original meaning of the Enabling Acts, we also have no occasion to decide (assuming the relevance of the Acts in the first place) whether the McCarran Amendment's grant of permission to the states to adjudicate Indian water rights was effected by a partial repeal of the Enabling Acts, or by an exercise of the very power reserved to Congress under those Acts.

problem arising out of the limitations that federal sovereign immunity placed on the ability of the States to adjudicate water rights, and nowhere in its text or legislative history do we find any indication that Congress intended the efficacy of the remedy to differ from one State to another. Moreover, we stated in *Colorado River* that "bearing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the Amendment excluding those rights from its coverage would enervate the Amendment's objective." 424 U.S., at 811, 96 S.Ct., at 1243. The "ubiquitous nature of Indian water rights" is most apparent in the very States to which Congress attached jurisdictional reservations. See *supra*, at 3210-3211. To declare now that our holding in *Colorado River* applies only to that minority of Indian water claims located in States without jurisdictional reservations would constitute a curious and unwarranted retreat from the rationale behind our previous holding, and would work the very mischief that our decision in *Colorado River* sought to avoid. We need not rely on the possibly overbroad statement in *Draper v. United States* that "equality of statehood is the rule," 164 U.S., at 244, 17 S.Ct., at 108, in order to conclude that, in this context at least, "equality of statehood" is sensible, necessary, and, most important, consistent with the will of Congress.

IV

The second crucial issue in these cases is whether our analysis in *Colorado River* applies with full force to federal suits brought by Indian tribes, rather than by the United

States, and seeking adjudication only of Indian water rights.[16] This question is not directly answered by *Colorado River*, because we specifically reserved in that case "[w]hether similar considerations would permit dismissal of a water suit brought by a private party in federal district court." 424 U.S., at 820, n. 26, 96 S.Ct., at 1248, n. 26. On reflection, however, we must agree with Justice STEVENS, who, in dissenting

16. As is apparent from our discussion of the facts, *supra*, at 3207 - 3209, some of the cases now before us are suits brought by the United States. In light of our express holding in *Colorado River*, what we say here with regard to the suits brought by the Indians must apply *a fortiori* to the suits brought by the United States. In addition, some of the cases before us sought adjudication of *all* the rights to a particular water system, rather than merely Indian or other federal water rights, and it is argued that these suits avoid the "piecemeal adjudication of water rights" which we found in *Colorado River* to be inconsistent with federal policy. 424 U.S., at 819, 96 S.Ct., at 1247. See, *e.g.*, Brief of Respondent Northern Cheyenne Tribe 25-29. Given, however, that one of the best arguments in favor of retaining federal jurisdiction in Indian water cases is that Indian water rights can be adjudicated separately and then incorporated into the results of the comprehensive state proceedings, see *infra*, at 3213, the proper analysis of the more ambitious federal suits at issue here must also follow *a fortiori* from our discussion in text. A comprehensive federal adjudication going on at the same time as a comprehensive state adjudication might not literally be "piecemeal." It is, however, duplicative, wasteful, inconsistent with the McCarran Amendment's policy of "recogniz[ing] the availability of comprehensive state systems for adjudication of water rights as the means for [conducting unified water rights proceedings]," *id.*, at 819, 96 S.Ct., at 1247, likely to "generat[e] additional litigation" as a result of "inconsistent dispositions of property," *ibid.*, and permeated with state law issues entirely tangential to any conceivable federal interest, see *id.*, at 820, 96 S.Ct., at 1248; cf. *Moses H. Cone Hospital*, 460 U.S., at ——, 103 S.Ct. 927.

from our decision, wrote: "[T]he Federal Government surely has no lesser right of access to the federal forum than does a private party, such as an Indian asserting his own claim. If this be so, today's holding will necessarily restrict the access to federal court of private plaintiffs asserting water rights claims in *Colorado.*" *Id.*, at 827, 96 S.Ct., at 1251.

The United States and the various Indian respondents raise a series of arguments why dismissal or stay of the federal suit is not appropriate when it is brought by an Indian tribe and only seeks to adjudicate Indian rights. (1) Indian rights have traditionally been left free of interference from the States. (2) State courts may be inhospitable to Indian rights. (3) The McCarran Amendment, although it waived United States sovereign immunity in state comprehensive water adjudications, did not waive *Indian* sovereign immunity. It is therefore unfair to force Indian claimants to choose between waiving their sovereign immunity by intervening in the state proceedings and relying on the United States to represent their interests in state court, particularly in light of the frequent conflict of interest between Indian claims and other federal interests and the right of the Indians under 28 U.S.C. § 1362 to bring suit on their own behalf in federal court.[17] (4) Indian water rights claims are generally based on

17. This argument, of course, suffers from the flaw that, although the McCarran Amendment did not waive the sovereign immunity of Indians as *parties* to state comprehensive water adjudications, it did (as we made quite clear in *Colorado River*) waive sovereign immunity with regard to the Indian *rights* at issue in those proceedings. Moreover, contrary to the submissions by certain of the parties, any judgment against the United States, as

(Cont'd)

federal rather than state law. (5) Because Indian water claims are based on the doctrine of "reserved rights," and take priority over most water rights created by state law, they need not as a practical matter be adjudicated *inter sese* with other water rights, and could simply be incorporated into the comprehensive state decree at the conclusion of the state proceedings.

Each of these arguments has a good deal of force. We note, though, that very similar arguments were raised and rejected in *Eagle County* and *Colorado River*.[18] More important, all of these

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(Cont'd)

trustee for the Indians, would ordinarily be binding on the Indians. In addition, there is no indication in these cases that the state courts would deny the Indian parties leave to intervene to protect their interests. Thus, although the Indians have the right to refuse to intervene even if they believe that the United States is not adequately representing their interests, the practical value of that right in this context is dubious at best.

18. See, *e.g.*, Brief for the United States in *United States v. District Court for Eagle County*, O.T.1970, No. 87, p. 19 ("excluding reserved water rights of the United States from State adjudication proceedings would not produce the 'undesirable, impractical and chaotic situation' that the Colorado Supreme Court envisioned"); Brief for the United States in *Colorado River Conservation District v. United States*, O.T.1975, No. 74-940, p. 33 (federal suit brought by United States involves only questions of federal law); pp. 35-36 (federal forum necessary to avoid "local prejudice"); pp. 43-44 (federal adjudication of Indian water rights can be incorporated into comprehensive state proceedings); pp. 50 (separate proceedings practical, as long as all determinations are ultimately integrated); pp. 53-54 (construing McCarran Amendment to grant States jurisdiction to adjudicate Indian water rights would ignore "unique legal status of Indian property").

arguments founder on one crucial fact: If the state proceedings have jurisdiction over the Indian water rights at issue here, as appears to be the case,[19] then concurrent federal proceedings are likely to be duplicative and wasteful, generating "additional litigation through permitting inconsistent dispositions of property." *Colorado River*, 424 U.S., at 819, 96 S.Ct., at 1247. Moreover, since a judgment by either court would ordinarily be res judicata in the other, the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the same issues first-a race contrary to the entire spirit of the McCarran Amendment and prejudicial, to say the least, to the possibility of reasoned decisionmaking by either forum. The United States and many of the Indian tribes recognize these concerns, but in responding to them they cast aside the sort of sound argument generally apparent in the rest of their submissions and rely instead on vague statements of faith and hope. The United States, for example, states that adjudicating Indian water right rights in federal court, despite the existence of a comprehensive state proceeding, would not

> "entail any duplication or potential for inconsistent judgments. The federal court will quantify the Indian rights only if it is asked to do so before the State court has embarked on the task. And, of course, once the United States district court has indicated its determination to perform that limited role, *we assume* the State tribunal will turn its attention to the typically more complex business of adjudicating all other claims on the

19. But cf. n. 20, *infra.*

> stream. *In the usual case*, the federal court will have completed its function earlier and its quantification will simply be incorporated in the comprehensive State court decree." Brief for the United States 30 (emphasis added).

Similarly, the Navajo Nation states:

> "There is no reasonably foreseeable danger that [the federal action brought by the Navajo] will duplicate or delay state proceedings or waste judicial resources. While the Navajo claim proceeds in federal court, the state court *can* move forward to assess, quantify, and rank the 58,000 state claims. The Navajo federal action will be concluded long before the state court has finished its task." Brief for the Navajo Nation 22 (emphasis added; footnote omitted).

The problem with these scenarios, however, is that they assume a cooperative attitude on the part of state courts, state legislatures, and state parties which is neither legally required nor realistically always to be expected. The state courts need not "turn their attention" to other matters if they are prompted by state parties to adjudicate the Indian claims first. Moreover, considering the specialized resources and experience of the state courts, it is not at all obvious that the federal actions "will be concluded long before" the state courts have issued at least preliminary judgments on the question of *Indian water rights*. *Cf.* 484 F.Supp., at 36.

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The McCarran Amendment, as interpreted in *Colorado River*, allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications. Although adjudication of those rights in federal court instead might in the abstract be practical, and even wise, it will be neither practical nor wise as long as it creates the possibility of duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decisionmaking, and confusion over the disposition of property rights.

Colorado River, of course, does not require that a federal water suit must always be dismissed or stayed in deference to a concurrent and adequate comprehensive state adjudication. Certainly, the federal courts need not defer to the state proceedings if the state courts expressly agree to stay their own consideration of the issues raised in the federal action pending disposition of that action. Moreover, it may be in a particular case that, at the time a motion to dismiss is filed, the federal suit at issue is well enough along that its dismissal would itself constitute a waste of judicial resources and an invitation to duplicative effort. See *Colorado River*, 424 U.S., at 820, 96 S.Ct., at 1248; *Moses H. Cone Hospital*, 460 U.S., at __, 103 S.Ct., at 937. Finally, we do not deny that, in a case in which the arguments for and against deference to the state adjudication were otherwise closely matched, the fact that a federal suit was brought by Indians on their own behalf and sought only to adjudicate Indian rights should be figured into the balance. But the most important consideration in *Colorado River*, and the most important consideration in any federal water suit concurrent to a comprehensive state proceeding, must be the "policy

underlying the McCarran Amendment," 424 U.S., at 820, 96 S.Ct., at 1248; see *Moses H. Cone Hospital*, *supra*, 460 U.S., at __, 103 S.Ct., at 937, and, despite the strong arguments raised by the respondents, we cannot conclude that water rights suits brought by Indians and seeking adjudication only of Indian rights should be excepted from the application of that policy or from the general principles set out in *Colorado River*. In the cases before us, assuming that the state adjudications are adequate to quantify the rights at issue in the federal suits,[20] and taking into account the McCarran Amendment policies we have just discussed, the expertise and administrative machinery available to the state courts, the infancy of the federal suits, the general judicial bias against piecemeal litigation, and the convenience to the parties, we must conclude that the District Courts were correct in deferring to the state proceedings.[21]

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20. In a number of these cases, respondents have raised challenges, not yet addressed either by the Court of Appeals or in this opinion, to the jurisdiction or adequacy of the particular state proceeding at issue to adjudicate some or all of the rights asserted in the federal suit. These challenges remain open for consideration on remand. Moreover, the courts below should, if the need arises, allow whatever amendment of pleadings not prejudicial to other parties may be necessary to preserve in federal court those issues as to which the state forum lacks jurisdiction or is inadequate.

21. We leave open for determination on remand as appropriate whether the proper course in such cases is a stay of the federal suit or dismissal without prejudice. See *Moses H. Cone Hospital*, 460 U.S., at __, 103 S.Ct., at 943 (reserving issue). In either event, resort to the federal forum should remain available if warranted by a significant change of circumstances, such as, for example, a decision by a state court that it does not have jurisdiction over some or all of these claims after all.

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V

Nothing we say today should be understood to represent even the slightest retreat from the general proposition we expressed so recently in *New Mexico v. Mescalero Apache Tribe*, *ante*, 462 U.S., at __, 103 S.Ct., at 2385 (1983): "Because of their sovereign status, [Indian] tribes and their reservation lands are insulated in some respects by an 'historic immunity from state and local control,' *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S.Ct. 1267, 1272, 36 L.Ed.2d 114 (1973), and tribes retain any aspect of their historical sovereignty not 'inconsistent with the overriding interests of the National Government.' *Washington v. Confederated Tribes*, [447 U.S. 134, 153, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980)]." Nor should we be understood to retreat from the general proposition, expressed in *Colorado River*, that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." 424 U.S., at 817, 96 S.Ct., at 1246. See generally *Moses H. Cone Hospital*, *supra*, 460 U.S., at __ - __, 103 S.Ct., at 936-937. But water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute, and we cannot in this context be guided by general propositions.

We also emphasize, as we did in *Colorado River*, that our decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review

before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.

The judgments of the Court of Appeals in each of these cases is reversed and the cases are remanded for further proceedings consistent with this opinion.[22]

So ordered.

Justice MARSHALL, dissenting.

In *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), this Court recognized a narrow rule of abstention governing controversies involving federal water rights. We stated that in light of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *id.*, at 817, 96 S.Ct., at 1246,"[o]nly the clearest of justifications," *id.*, at 819, 96 S.Ct., at 1247, will warrant abstention in favor of

22. The motion of the Blackfeet Indian Tribe, filed March 22, 1983, to suspend all proceedings in this Court rejecting the water rights of the Blackfeet Indian Tribe, Browning, Montana, and to preclude the Solicitor General or any other attorney of the Department of Justice from purporting to represent that Tribe in these proceedings is denied. The motion of the White Mountain Apache Tribe and the Blackfeet Indian Tribe, filed June 3, 1983, for leave to file a motion to dismiss for lack of in personam and subject matter jurisdiction in this Court over the state court water rights adjudication proceedings is denied. Treating the papers whereon the motion filed June 3, 1983 was submitted as a motion for leave to file a brief *amicus curiae*, and treating the accompanying papers as a brief *amicus curiae*, leave to file the brief is granted.

a concurrent state proceeding. Substantially for the reasons set forth in Justice STEVENS' dissenting opinion, I believe that abstention is not appropriate in these cases. Unlike the federal suit in *Colorado River*, the suits here are brought by Indian tribes on their own behalf. These cases thus implicate the strong congressional policy, embodied in 28 U.S.C. § 1362, of affording Indian tribes a federal forum. Since § 1362 reflects a congressional recognition of the "great hesitancy on the part of tribes to use State courts," S.Rep. No. 1507, 89th Cong., 2d Sess. 2 (1966), tribes which have sued under that provision should not lightly be remitted to asserting their rights in a state forum. Moreover, these cases also differ from *Colorado River* in that the exercise of federal jurisdiction here will not result in duplicative federal and state proceedings, since the District Court need only determine the water rights of the tribes. I therefore cannot agree that this is one of those "exceptional" situations justifying abstention. 424 U.S., at 818, 96 S.Ct., at 1246.

Justice STEVENS, with whom Justice BLACKMUN joins, dissenting.

"Nothing in the McCarran Amendment or in its legislative history can be read as limiting the jurisdiction of the federal courts." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 821, n. 2, 96 S.Ct. 1236, 1248, n. 2, 47 L.Ed.2d 483 (1976) (Stewart, J., dissenting). That amendment is a waiver, not a command.[1] It *permits* the United States to be joined as a defendant in state water rights adjudications; it does not purport to

1. See *ante*, at 3204, n. 1 (quoting the statutory text).

diminish the United States' right to litigate in a federal forum and it is totally silent on the subject of Indian tribes' rights to litigate anywhere. Yet today the majority somehow concludes that it commands the federal courts to defer to state court water rights proceedings, even when Indian water rights are involved. Although it is customary for the Court to begin its analysis of questions of statutory construction by examining the text of the relevant statute,[2] one may search in vain for any textual support for the Court's holding today.

"Most of the land in these reservations is and always has been arid. . . . It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind-hot, scorching sands-and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Arizona v. California*, 373 U.S. 546, 598-599, 83 S.Ct. 1468, 1496-1497, 10 L.Ed.2d 542 (1963)

2. See, *e.g.*, *Bankamerica Corp. v. United States*, __ U.S. __, __ - __, 103 S.Ct. 2266, 2270-2271, 75 L.Ed.2d __ (1983); *Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs*, __ U.S. __, __ - __, 103 S.Ct. 2045, 2049-2050, 76 L.Ed.2d 194 (1983); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982); *Bread Political Action Committee v. Federal Election Comm'n*, 455 U.S. 577, 580-581, 102 S.Ct. 1235, 1237-1238, 71 L.Ed.2d 432 (1982); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980).

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This Court has repeatedly recognized that the Government, when it created each Indian Reservation, "intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been valueless." *Id.*, at 600, 83 S.Ct., at 1497. See *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908); *United States v. Powers*, 305 U.S. 527, 532, 59 S.Ct. 344, 346, 83 L.Ed. 330 (1939); *Arizona v. California*, 373 U.S. 546, 600-601, 83 S.Ct. 1468, 1497-1498, 10 L.Ed.2d 542 (1963); *Cappaert v. United States*, 426 U.S. 128, 138-139, 96 S.Ct. 2062, 2069-2070, 48 L.Ed.2d 523 (1976). This doctrine, known as the *Winters* doctrine, is unquestionably a matter of *federal*, not state, law. See *ante*, at 3216; *Colorado River*, *supra*, 424 U.S., at 813, 96 S.Ct., at 1244. Its underlying principles differ substantially from those applied by the States to allocate water among competing claimants. Unlike state-law claims based on prior appropriation, Indian reserved water rights are not based on actual beneficial use and are not forfeited if they are not used. Vested no later than the date each reservation was created, these Indian rights are superior in right to all subsequent appropriations under state law. Not all of the issues arising from the application of the *Winters* doctrine have been resolved, because in the past the scope of Indian reserved rights has infrequently been adjudicated.[3] The important task of elaborating and clarifying these federal law issues in the cases now before the Court, and in future cases, should be performed by federal rather than state courts whenever possible.

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3. See generally Note, Indian Reserved Water Rights: The *Winters* of Our Discontent, 88 Yale L.J. 1689, 1690-1701 (1979).

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Federal adjudication of Indian water rights would not fragment an otherwise unified state court proceeding. Since Indian reserved claims are wholly dissimilar to state-law water claims, and since their amount does not depend on the total volume of water available in the water source or on the quantity of competing claims, it will be necessary to conduct separate proceedings to determine these claims even if the adjudication takes place in state court. Subsequently the state court will incorporate these claims-like claims under state law or federal Government claims that have been formally adjudicated in the past-into a single inclusive, binding decree for each water source. Thus, as Justice Stewart wrote in dissent in *Colorado River*,"Whether the virtually identical separate proceedings take place in a federal court or a state court, the adjudication of the claims will be neither more nor less 'piecemeal.' Essentially the same process will be followed in each instance." 424 U.S., at 824, 96 S.Ct., at 1250.

To justify virtual abandonment of Indian water rights claims to the state courts, the majority relies heavily on *Colorado River Water Conservation District*, *supra*, which in turn discovered an affirmative policy of federal judicial abdication in the McCarran Amendment.[4] I continue to

4. Although giving lip service to the balancing of factors set forth in *Colorado River*, the Court essentially gives decisive weight to one factor: the policy of unified water rights adjudication purportedly embodied in the McCarran Amendment. *Ante*, at 3206, 3215. The Court's entire discussion of the applicability in this case of the four *Colorado River* factors is found in a single vague sentence. *Ante*, at 3215. It is worth noting, however, that the Court leaves open the possibility that Indian water claims will occasionally be heard in federal court. *Ante*, at 3215.

believe that *Colorado River* read more into that amendment than Congress intended, and cannot acquiesce in an extension of its reasoning. Although the Court's decision in *Colorado River* did, indeed, foreshadow today's holding, it did not involve an Indian tribe's attempt to litigate on its own behalf, 424 U.S., at 820, n. 26, 96 S.Ct., at 1248, n. 26. The majority today acknowledges that the question in these cases was "not directly answered," but in fact was "specifically reserved," in *Colorado River. Ante*, 3212 - 3213.

Although in some respects Indian tribes' water claims are similar to other reserved federal water rights, different treatment is justified. States and their citizens may well be more antagonistic toward Indian reserved rights than other federal reserved rights, both because the former are potentially greater in quantity and because they provide few direct or indirect benefits to non-Indian residents.[5] Indians have historically enjoyed a unique relationship with the federal government, reflecting the tribes' traditional sovereign status, their treaty-based right to federal protection,

5. See Comptroller General of the United States, Reserved Water Rights for Federal and Indian Reservations: A Growing Controversy in Need of Resolution 18 (Nov. 1978) ("Indian reserved water rights present a more pressing problem than Federal reserved water rights. Unlike federal reservations, which are not expected to have large consumptive water demands, many Indian reservations are expected to require significant water quantities to satisfy reservation purposes.") In addition, national forests, national parks, and other federal uses provide benefits to non-Indian residents, including lumbering operations, grazing, recreational purposes, watershed protection, and tourist revenues. See Note, Adjudication of Indian Water Rights Under the McCarran Amendment: Two Courts are Better Than One, 71 Georgetown L.J. 1023, 1053-1054 (1983).

and their special economic problems. Recently the Court reaffirmed " 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.' " *United States v. Mitchell*, __ U.S. __, __, 103 S.Ct. 2961, 2972, 75 L.Ed.2d __ (1983). See also *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-175, 93 S.Ct. 1257, 1260-1264, 36 L.Ed.2d 129 (1973); *Rice v. Olson*, 324 U.S. 786, 789, 65 S.Ct. 989, 991, 89 L.Ed. 1367 (1945).[6]

One important aspect of the special relationship is 28 U.S.C. § 1362, which embodies a federal promise that Indian tribes will be able to invoke the jurisdiction of federal courts to resolve matters in controversy arising under federal law.[7]

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6. Congress has been particularly solicitous of Indian property rights, including water rights, even when it has expanded the governmental role of the States with respect to Indian affairs. In 1953, a year after the McCarran Amendment was passed, Congress authorized the States to assume general criminal and limited civil jurisdiction within "Indian country," but it expressly withheld certain matters, including water rights, from state adjudication. Pub.L. 280, 67 Stat. 588, codified at 25 U.S.C. § 1322(b); 28 U.S.C. § 1360(b). The Court held in *Colorado River* that this proviso to P.L. 280 did not purport to limit the special consent to jurisdiction given by the McCarran Amendment. 424 U.S., at 812-813, n. 20, 96 S.Ct., at 1243-1244, n. 20. But, even assuming that state courts have jurisdiction to adjudicate Indian water claims, the proviso casts serious doubt on the assertion that Congress intended state courts to be the *preferred* forum.

7. The statute provides:

"The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band

(Cont'd)

Congress thereby assured Indians a neutral federal forum—a guarantee whose importance should not be underestimated.[8] The Senate report noted,

> "There is great hesitancy on the part of tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have

(Cont'd)

> with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

Enacted in 1966, § 1362 was designed to remove the $10,000 jurisdictional amount limitation with respect to these claims.

8. The majority recognizes that there is "a good deal of force" to the assertion that "[s]tate courts may be inhospitable to Indian rights." *Ante*, at 3213. Federal officials responsible for Indian affairs have consistently recognized the appropriateness of deciding Indian claims in federal, not state, courts. See, *e.g.*, H.R.Rep. No. 2040, 89th Cong., 2d Sess. 2 (1966) (describing position of Interior Department); National Water Comm'n, Water Policies for the Future, Final Report to the President and to the Congress of the United States 478-479 (1973). American Indian Policy Review Commission, Task Force Four, Report on Federal, State, and Tribal Jurisdiction 176 (Committee Print 1976); American Indian Policy Review Commission, Final Report 333-334 (Committee Print 1977).

Although the Court correctly observes that state courts, "as much as federal courts, have a solemn obligation to follow federal law," *ante*, at 3216, state judges, unlike federal judges, tend to be elected and hence to be more conscious of the prevailing views of the majority. Water rights adjudications, which will have a crucial impact on future economic development in the West, are likely to stimulate great public interest and concern. See Note, *supra* n. 5, at 1052-1053.

had of the States in which their reservations are situated. Additionally, the Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years." S.Rep. No. 1507, 89th Cong., 2d Sess. 2 (1966).

Section 1362 also assured the tribes that they need not rely on the federal government to protect their interests, an important safeguard in light of the undeniable potential for conflicts of interest between Indian claims and other federal Government claims.[9]

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9. The Senate report stated:

> "Currently, the right of the Attorney General of the United States to bring civil actions on behalf of tribes without regard to jurisdictional amount, a power conferred on him by special statutes, is insufficient in those cases wherein the interest of the Federal Government as guardian of the Indian tribes and as Federal sovereign conflict, in which case the Attorney General will decline to bring the action.
>
> "The proposed legislation will remedy these defects by making it possible for the Indian tribes to seek redress using their own resources and attorneys." S.Rep. No. 1507, *supra*, at 2.

If federal courts defer to state court proceedings, then the Indian tribes will be unable to represent themselves without waiving tribal sovereign immunity from state court jurisdiction.

Appendix G

Despite the silence of the McCarran Amendment regarding Indian tribal claims, and the clear promise of a federal forum embodied in § 1362, the Court holds that considerations of "wise judicial administration" require that Indian claims, governed by federal law, must be relegated to the state courts. It is clear to me that the words "wise judicial administration" have been wrenched completely from their ordinary meaning. One of the Arizona proceedings, in which process has been served on approximately 58,000 known water claimants, illustrates the practical consequences of giving the state courts the initial responsibility for the adjudication of Indian water rights claims. Because this Court may not exercise appellate jurisdiction in state court litigation until after a final judgment has been entered by the highest court of the State, no federal tribunal will be able to review any federal question in the case until the entire litigation has been concluded. The Court promises that "any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment." *Ante*, at 3216. If a state court errs in interpreting the *Winters* doctrine or an Indian treaty, and this Court ultimately finds it necessary to correct that error, the entire comprehensive state court water rights decree may require massive readjustment. If, however, the quantification of Indian rights were to be adjudicated in a separate federal proceeding-which presumably would be concluded long before the mammoth, conglomerate state adjudication comes to an end-the state judgment would rest on a solid foundation that this Court should never need to examine.

The Court acknowledges the logical force of these propositions, but sets them aside because the exercise of concurrent federal court jurisdiction would create "the possibility of duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decisionmaking, and confusion over the disposition of property rights." *Ante*, at 3215. These possibilities arise, as the Court candidly admits, from a pessimistic assessment of the likelihood that state courts, state legislatures, and state parties will assume a "cooperative attitude." In other words, the state courts might engage in an unseemly rush to judgment in order to give the Indians less water than they fear that the federal courts might provide. If state courts cannot be expected to adhere to orderly processes of decisionmaking because of their hostility to the Indians, the statutory right accorded to Indian tribes to litigate in a federal tribunal is even more important.

In my view, a federal court whose jurisdiction is invoked in a timely manner by an Indian tribe has a duty to determine the existence and extent of the tribe's reserved water rights under federal law. It is inappropriate to stay or dismiss such federal court proceedings in order to allow determinations by state courts. In the cases before us today, complaints were timely filed in federal court by the Indian tribes, before or shortly after the institution of state water adjudication proceedings; the state proceedings in Arizona and Montana remain at an early stage. The district court should therefore grant the tribes leave to amend the various complaints, where necessary, to seek adjudication of the scope and quantity of Indian reserved water rights and to eliminate other claims; the suits should then proceed in federal court.

Today, however, on the tenuous foundation of a perceived Congressional intent that has never been articulated in statutory language or legislative history, the Court carves out a further exception to the "virtually unflagging obligation" of federal courts to exercise their jurisdiction. The Court does not-and cannot-claim that it is faithfully following general principles of law. After all, just four months ago in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court wrote:

> "we emphasize that our task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction. Although in some rare circumstances the presence of state-law issues may weigh in favor of that surrender . . . the presence of federal-law issues must always be a major consideration weighing against surrender." __ U.S. __, __, 103 S.Ct. 927, 942, 74 L.Ed.2d 765.

Today that "major consideration" is but a peppercorn in the scales, outweighed by the phantom command of the McCarran Amendment. Instead of trying to reconcile this decision with *Moses H. Cone* and other prior cases, the Court merely says, "But water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute, and we cannot in this context be guided by general propositions." *Ante*, at 3216.

I submit that it is the analysis in Part IV of the Court's opinion that is "virtually unique." Accordingly, I respectfully dissent.

APPENDIX H — SPECIAL PROCEDURAL ORDER PROVIDING FOR INTERLOCUTORY APPEALS AND CERTIFICATIONS DATED AND FILED SEPTEMBER 26, 1989

IN THE SUPREME COURT OF THE STATE OF ARIZONA

Action No. WC-1, WC-2, WC-3 and WC-4 (consolidated)

Maricopa County Superior Court Nos. W-1, W-2, W-3 and W-4 (consolidated)

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE IN THE GILA RIVER SYSTEM AND SOURCE

SPECIAL PROCEDURAL ORDER PROVIDING FOR INTERLOCUTORY APPEALS AND CERTIFICATIONS

Pursuant to Article 6, § 5 of the Arizona Constitution, A.R.S. §§ 45-259 and 12-2101, and Rule 19(a)(3) and (f), Arizona Rules of Civil Appellate Procedure, 17B A.R.S., the following procedure is adopted for interlocutory appeals and certifications arising from this general adjudication:

A. Scope

Any party to this general adjudication of water rights under A.R.S. § 45-251 *et seq.* may petition the Supreme Court to review by interlocutory appeal any ruling of the ~~superior~~ court. Also, the trial court may certify to the Supreme Court questions deemed substantial and properly the subject of interlocutory review or appeal under this rule.

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B. Grounds

The decision whether to grant or deny a petition for interlocutory review or appeal or certification shall be discretionary. In the exercise of its discretion the Supreme Court may consider, without limitation, the following factors:

1. That the ruling of the superior court is in conflict with a ruling from another adjudication proceeding pursuant to A.R.S. § 45-251 *et seq.*;

2. That the ruling has decided an important question of law that should be decided by the Supreme Court before further proceedings or final judgment in the trial court;

3. That substantial savings of time, expense, or resources may be achieved through early appellate review;

4. That the interests of justice otherwise require early appellate review;

5. Those factors described in Rule 23(c)(4), Ariz.R.Civ. App.P., 17B A.R.S., or Rule 3, Ariz.R.P.Spec.Act., 17B A.R.S.

C. Time for Filing of Petition; Cross-Petition

A petition or certification seeking interlocutory review or appeal of a trial court ruling made prior to the effective date of this order shall be filed within one hundred fifty days after the effective date of this order. A petition or certification seeking interlocutory review or appeal of a trial court ruling

made after the effective date of this order shall be filed within ninety days after the trial court's ruling. For purposes of this rule, the date of the trial court's ruling shall be the date on which the last motion for reconsideration or request for amendment and/or alteration, however denominated, is finally resolved, providing such motion is filed within thirty days after the date the trial court first ruled on the question. A cross-petition for an interlocutory appeal may be filed within thirty days after service of a petition or certification.

D. Form and contents of petition, cross-petition or certification

To the extent possible, the petition, cross-petition or certification seeking interlocutory review or appeal shall comply in form and content with Rule 23(c), Ariz.R.Civ.App.P., 17B A.R.S. In addition, the petition or cross-petition shall contain a concise statement showing why the questions are ripe for interlocutory appeal.

E. Service

The petition, cross-petition or certification shall be served in the same manner as the superior court pleadings in this general adjudication, as follows:

1. A copy of the petition, cross-petition or certification shall be mailed to all parties listed on the trial court's approved mailing list pursuant to Pre-Trial Order No. 1. A copy of the current approved mailing list shall accompany the petition. In addition, a copy of the petition, cross-petition or certification shall be filed in this general adjudication

proceeding. A copy of the petition, cross-petition or certification shall be served on the judge or master who made the ruling in question and on the Arizona Department of Water Resources.

2. The Arizona Department of Water Resources shall promptly serve a copy of the petition, cross-petition or certification on the judge or master and clerk of any other superior court in which a general adjudication is pending, who shall then give appropriate notice of the pendency of such petition to the parties to that adjudication.

F. Response

Within forty-five (45) days after service of a petition, cross-petition or certification, any party to the trial court proceeding may file a response, which shall comply in form and content with section (D) of this order and be served in the same manner as the petition, cross-petition or certification. Parties to other pending general adjudication desiring to participate in an interlocutory appeal shall file a motion for leave to intervene within forty-five (45) days after service of the petition pursuant to subsection (E)(2).

G. Reply

Any party to the proceeding below may reply to any response within thirty (30) days after service thereof. A reply shall be served in the same manner as a petition.

Appendix H

H. Order on petition; service

1. This court may issue its order on the petition, cross-petition, or certification without oral argument. The order shall grant or deny review by interlocutory appeal and specifically list those questions, if any, granted. An order denying a petition or certification or any part thereof shall not have any precedential value.

2. The order granting or denying interlocutory appeal shall be served by the Clerk of the Supreme Court on the trial judge, the master, the petitioner, the cross-petitioner, if any, and all persons listed on the service list accompanying the petition, and shall be filed of record by the Clerk of the Superior Court.

3. An order granting review by interlocutory appeal shall also schedule a pre-submittal conference not sooner than sixty (60) days after the service of the order, as provided below.

4. The Supreme Court may, on its own motion or on motion of the parties, consolidate one or more petitions, cross-petitions, or certifications from the same or different general adjudication proceedings for any or all purposes.

I. Pre-submittal conference

No later than twenty (20) days prior to the scheduled pre-submittal conference, each party desiring to participate in the interlocutory appeal shall file a notice of appearance in the Supreme Court. The trial court shall not be deemed a party to the appeal, nor shall it participate in the appeal in

any respect, even if the appeal is based on its certification. The Supreme Court may designate the parties as appropriate and, in the case of a certification, may align the parties in accord with their true interest in the questions presented. At the presubmittal conference, the Supreme Court shall make orders regarding further briefing and oral argument, if any. It shall also determine what portion of the record will be required to be transmitted, the date of transmittal, the parties to join in the presentation of issues, and other appropriate matters.

J. Standard of review

The standard of review to be applied to any interlocutory appeal under this rule shall be the same standard that would apply had the review been made following a final judgment in the adjudication proceeding.

K. Costs and attorneys' fees

Unless provided by statute, there shall be no application for costs or attorneys' fees made to the Supreme Court in connection with a petition for review by interlocutory appeal or with an interlocutory appeal granted under this rule. However, Rule 25, Ariz.R.Civ.App.P., 17B A.R.S., is fully applicable to pleadings filed pursuant to this order. All other issues of costs and attorneys' fees, if any, shall abide the final resolution of the adjudication.

L. Other procedures

1. Except as otherwise provided herein, the Arizona Rules of Civil Appellate Procedure shall apply to proceedings

under this order. Insofar as may be necessary, the provisions of Rule 5, Ariz.R.P.Spec.Act., 17B A.R.S., concerning stays, *ex parte* orders, restraining orders, and injunctions shall also apply.

2. This order is the exclusive remedy for the presentation of interlocutory issues to this court in this adjudication, including those issues that otherwise might be presented pursuant to the Rules of Procedure for Special Actions.

M. Priority

Insofar as possible, matters in this general adjudication shall be determined in preference to other civil matters.

N. Filing date and extension of time periods

All pleadings in any proceeding under this order shall be deemed filed on the day of mailing if deposited in a United States Post Office or mailbox, addressed to the Clerk of the Supreme Court, within the time allowed for filing. The Court, on its own motion, or by motion of a party with good cause shown, may grant extensions of any of the time limits set out in this order.

COMMENTS

Purpose. The purpose of this order is to establish a procedure for early review of all substantial questions in this general adjudication of water rights. Early appellate review may avoid wasteful trial court proceedings, may result in substantial savings of time or expense, or may for other

reasons be in the interests of justice. The rule is not intended to be used for interlocutory appeal of individualized matters except where such an appeal might result in a ruling of general application that would advance the adjudication process.

Need. Existing procedure allows interlocutory considerations of trial court rulings in certain limited circumstances. Thus, A.R.S. § 12-2101 describes the appellate jurisdiction of the Arizona Court of Appeals with respect to final judgments and certain interlocutory orders. Rule 54, Ariz.R.Civ.P., 16 A.R.S., provides a certification procedure for making certain judgments final that would not otherwise be appealable. The Rules of Procedure for Special Actions permit discretionary review of interlocutory decisions where the decision is arbitrary, capricious, or an abuse of discretion, or where the trial court may be proceeding without, or in excess of, jurisdiction. None of these procedures, however, provides for discretionary appellate jurisdiction of the Supreme Court other than in these limited circumstances.

A general adjudication of water rights filed pursuant to A.R.S. § 45-251 *et seq.* is a lengthy proceeding that requires investment of vast public and private resources. There is a need to provide for discretionary appellate review of interlocutory decisions of the trial court in this proceeding to avoid the waste that might otherwise occur if significant interlocutory decisions were only reviewable after final judgment, which might not be entered for several years.

Appendix H

Jurisdiction and authority. Article 6, § 5 of the Arizona Constitution provides that the Supreme Court shall have:

> 3. Appellate jurisdiction in all actions and proceedings except civil and criminal actions originating in courts not of record, unless the action involves the validity of a tax impost, assessment, toll, statute or municipal ordinance.
>
> 5. Power to make rules relative to all procedural matters in any court.

Rule 19, Arizona Rules of Civil Appellate Procedure, 17B A.R.S., authorizes the Supreme Court to transfer appeals from the Appeals Court on its own motion. The adoption of this special procedural order will effectively transfer all interlocutory appeals under this order to the Supreme Court pursuant to Rule 19(f).

Service. Subsection (D) of the order provides for service of the petition on parties to the adjudication in the same manner as other pleadings are served. In addition, filing the pleading of record in the superior court proceedings will cause the petition to be listed in the clerk's docket summary, which is mailed monthly to subscribers and which is available in the clerk's office for review by any party.

Response/cross-petition. The response provides a party with the opportunity to support the petition or set forth the reasons why the petitions should not be granted. The response may also seek to narrow the scope of the interlocutory appeal if granted or to reformulate the matter for which interlocutory

appeal is sought. The cross-petition may seek to have the court grant an interlocutory appeal of additional related questions if the petition or certification is granted. The cross-petition should make the same showing as required for the petition itself.

Order denying petition. Unless stated to the contrary, an order denying a petition, cross-petition or certification is not intended to indicate that the Supreme Court approves of the trial court's ruling, but only that the Supreme Court has determined that there is an insufficient basis on which to grant review by interlocutory appeal. A subsequent petition, cross-petition or certification seeking interlocutory review or appeal of a ruling for which a previous petition has been denied may be entertained by the court, but only on a showing of a change of circumstances or additional grounds which could not, in the exercise of reasonable diligence, have been known at the time of the previous petition, cross-petition or certification.

Stay. The granting of a petition for an interlocutory appeal shall not stay the proceedings in the superior court unless expressly so ordered by the Supreme Court.

Dated this 26th day of September, 1989.

s/ Stanley G. Feldman
STANLEY G. FELDMAN, VICE CHIEF JUSTICE

APPENDIX I — MINUTE ENTRY OF THE SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY DATED SEPTEMBER 11, 1998

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

No. W-1, W-2, W-3, W-4 (Consolidated)
Contested Case No. W1-203

Clerk of the Court
Form R000A

P. Woods
Deputy

September 11, 1998 HON. SUSAN R. BOLTON

In re the General Adjudication of all Rights to Use Water in the Gila River System and Source

2:05 p.m. This is the time set for a Status Hearing. Present are: Barry Sanders, Bill Staudenmaier, John Hestand, Burt Apker, Kevin Tehan, John Ryley, Lauren Caster, Steve Were, Sheila Schmidt, Bob Hoffman, Carlos Ronstadt, Marilyn Cage, John Schaper, William Sullivan, Rod Lewis, Michael Pearce, Steven Heeley, Jennele O'Hair, Patrick Barry, John Weldon, Alfred Cox, Lee Storey, Sally Worthington, Bill Anger, Anthony Fines, Jim Johnson, Special Master John Thorson, Kathy Dolge, Oscar Garcia and Alma Cano.

Court Reporter Kim Myrick is present.

Appendix 1

AS TO THE GLOBE EQUITY DECREE:

The Court suggested that the parties proceed with a Motion for Summary Judgment to determine if Globe Equity has a preclusive effect on the Gila River Indian Community's claims.

Anthony Fines, representing the Gila Valley Irrigation District/Franklin Irrigation District (GVID/FID), agreed that the matter should proceed on Motion for Summary Judgment. He stated that the Motion for Summary Judgment can proceed on the existing documents. He suggested that the Motion for Summary Judgment be filed by 4-1-99.

John Weldon, representing the Salt River Project claimants, agreed that the matter should proceed on Motion for Summary Judgment.

Patrick Barry, representing the United States, expressed his concern that there are gaps in the historical record. He stated that affidavits documenting the historical record would aid the Court in understanding the decree. He also stated that another alternative would be to wait until the HSR is prepared.

Rod Lewis, representing the Gila River Indian Community, agreed that the matter should proceed on Motion for Summary Judgment. He suggested that the Motion for Summary Judgment be filed by 2-15-99.

The Court reminded the parties to focus exclusively on the preclusive effect of the Globe Equity decree in the Motion

for Summary Judgment. The other decrees and agreements will be addressed at a later time. The parties were directed to refer to the documents as numbered by the Special Master. No previously submitted documents shall be attached to the motions, responses or replies.

IT IS THEREFORE ORDERED that any party who has filed a disclosure and believes that the Globe Equity Decree has a preclusive effect on the Gila River Indian Community's water right claims must file a Motion for Summary Judgment not later than March 1, 1999.

IT IS FURTHER ORDERED that any responses in opposition thereto shall be filed within 60 days thereafter.

IT IS FURTHER ORDERED that any replies shall be filed within 30 days thereafter.

LET THE RECORD REFLECT that the parties are encouraged to attempt to file joint motions and responses to the extent possible.

After discussion with the parties,

IT IS FURTHER ORDERED that the Motion for Summary Judgment be limited to 50 pages; the Response be limited to 50 pages; and, the Reply be limited to 25 pages.

John Ryley, representing the San Carlos, Tonto, Yavapai and Apache Tribes, expressed his concern as to the potential effects on the San Carlos Apache Tribes and whether this matter should be proceeding.

Mr. Barry also expressed his concern that the outcome of the Motion for Summary Judgment may significantly impact the San Carlos Apache Tribes and not just the Gila River Indian Community.

The Court stated that the San Carlos Apache Tribe is not precluded from filing a response. John Schaper, representing the Buckeye Irrigation District, suggested that the parties be able to file a joinder to adopt the position of any party in the motion or response, within 10 days of the filing of the motion or response. The Court agreed that any party may join in a motion or response within 10 days of filing but shall not file any additional statement of facts or memorandum of points and authorities.

AS TO THE PURPOSES OF THE GILA RIVER INDIAN RESERVATION:

The Court noted that this will be a factual matter requiring discovery, expert witnesses and reports.

Mr. Lewis advised the Court that their experts will be finished during the first part of 1999 and are contemplating filing a Motion for Summary Judgment in July of 1999.

Mr. Barry requested that there be a simultaneous exchange of the expert witness reports. He stated that the United States has met its burden by filing the claim and the burden of proof should be upon the opponents to the claim.

Mr. Weldon argued that this is the Gila River Indian Community's claim and the burden of establishing the

purposes of the reservation falls on them. He also expressed his concern that the other decrees and agreements be determined before the parties proceed too far on the purposes.

After discussion with the parties,

IT IS ORDERED that the expert witness reports relating to the purposes of the reservation be prepared and exchanged by April 1, 1999.

IT IS FURTHER ORDERED setting a Status Conference on December 21, 1998 at 2:00 p.m. to discuss further proceedings on the other decrees and agreements, and discovery and hearing dates on the purposes of the reservation.

LET THE RECORD REFLECT that the Court instructed the parties to propose a logical procedure concerning the other decrees and agreements and whether they should proceed simultaneously with the purposes.

Mr. Barry expressed his concern that not all of the disclosures comply with the Order. He then requested 30 days within which to file Motions to Strike certain documents.

IT IS ORDERED granting the parties 30 days to file any Motions to Strike.

ADDITIONAL MATTERS:

Mr. Lewis requested a status report concerning the additional volumes of the preliminary HSR being prepared.

Appendix I

Mike Pearce, representing the Arizona Department of Water Resources (ADWR), stated that the additional chapters are being drafted and will be completed by the end of this year. He will advise the parties on 12-21-98 as to when the chapters will be available.

The Court advised the parties that Mr. Cox has been elected as Chairman of the Steering Committee.

Pursuant to the parties' request,

IT IS ORDERED that James M. Flenner be relieved from serving on the Steering Committee and that William H. Anger be appointed to the Steering Committee.

The Court publicly thanked Special Master John Thorson, Kathy Dolge, Oscar Garcia and Alma Cano for numbering and indexing the set of documents provided by the parties.

3:10 p.m. Court adjourns.

* * *

A copy of this minute entry is mailed to all parties on the Court-approved W-1, W-2, W-3 and W-4 mailing list dated 1-15-98.

APPENDIX J — MINUTE ENTRY OF THE SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY DATED AUGUST 24, 1999

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

No. W-1, W-2, W-3, W-4 (Consolidated)
Contested Case No. W1-203 & W1-204

Clerk of the Court
Form R000A

P. Woods
Deputy

August 24, 1999 HON. SUSAN R. BOLTON

In re The General Adjudication of all Rights to Use Water in the Gila River System and Source

9:05 a.m. This is the time set for a Status Hearing. Present are: Lauren Caster, Steve Wene, Mary Grier, Riney Salmon, Reed King, Mike Brophy, Cynthia Haglin, Robert Hoffman, John Schaper, Kevin Tehan, John Hestand, Rodney Lewis, Anthony Fines, David Brown, Brad Keogh, Lee Storey, Jan Ronald, Marilyn Cage, William Anger, John Weldon, Byron Lewis, Frederic Beeson, Bill Staudenmaier, Dawn Meidinger, Sally Worthington, Joe Padilla, Robin Fohrenkam, Paul Norman, Irval Mortensen, Gregg Houtz, James Callahan, Patrick Barry, Special Master John Thorson and Kathy Dolge.

Court Reporter Kim Myrick is present.

Appendix J

As to Scheduling Dates for Motions for Summary Judgment Re Preclusive Effect of Globe Equity and Motions for Summary Judgment on Other Agreements and Decrees (Threshold Issues):

The Court advises that the Gila River Indian Community (GRIC), Gila Valley Irrigation District (GVID) and the Franklin Irrigation District's (FID) Joint Motion for a Stay in the Proceedings in W1-203 has been granted in accordance with the parties' request by minute entry dated 8-20-99.

LET THE RECORD REFLECT that the Court notes that it would not be inclined to grant any further continuances unless a settlement is reached.

As to the Status of Settlement Discussions on the Gila River Indian Community Water Rights Claims:

Rodney Lewis, representing the Gila River Indian Community (GRIC), reported that substantial progress has been made. He stated that the agreements between the cities and towns as well as the south-side pumpers are progressing. He also stated that problems still exist with the Upper Gila Valley, Franklin Irrigation District (FID) and the San Carlos Apache Tribe. He further stated that parties are still on track for Senator Kyl's deadline of 9-30-99 for having negotiations completed and the legislation drafted for Congress.

Robert Hoffman, representing Central Arizona Water Conservation District (CAWCD), stated that a drafted stipulation to settle the federal litigation has been negotiated by the parties and he was optimistic about its approval.

John Weldon, representing Salt River Project, stated that major differences of opinions still exist on settlement issues. He stated that numerous issues that were originally unresolved, remain unresolved. For example, he stated that it has not been determined how this settlement will be funded. He stated that federal budget negotiations will have to take place on the appropriation procedure.

As to Notice Issues on the Effect of Globe Equity 59 Decree on Claimants:

The Court advises that it and the Special Master have met with the Arizona Department of Water Resources (ADWR) to discuss ADWR's ability to identify and notice Upper Valley claimants in this matter who are not already represented or who are not presently on the court-approved mailing list. The Court stated that it was determined the current ADWR mailing list is 40 percent inaccurate. The Court further stated that this is not a viable solution in light of the approaching deadlines.

Mr. Anthony Fines, representing the Gila Valley Irrigation District (GVID), stated that he has submitted to ADWR the federal court-approved mailing list for Globe Equity as well as the GVID current member list.

Mr. David Brown, representing the Franklin Irrigation District (FID), stated that he would be providing a list of current members shortly.

Patrick Barry, representing the United States, stated that they are requesting this information in order to formulate

the scope of their Motion for Summary Judgment, not necessarily to require that notice be given to all parties. He stated that they are interested in any claims the members of the district may have previously filed or are currently pending, other than Globe Equity 59 Decree claims.

Jan Ronald, representing ADWR, stated that formulating such a list as requested by Mr. Barry may be possible. Mr. Barry will meet with ADWR to acquire the claimant information.

Special Master John Thorson stated that he is working with ADWR and the Steering Committee to recommend how to resolve the mailing list issue. He stated that he will prepare a draft report on the mailing list issue within the next three weeks.

As to Briefing Schedule Re the Effect of Globe Equity 59 Decree:

Mr. Fines requested the Court to set a briefing schedule on this matter.

After discussion with counsel,

IT IS ORDERED affirming that the parties file their Rule 26.1 Disclosures (as modified in the Court's order for disclosure regarding the Gila River Indian Community) on all Globe Equity 59 Decree preclusion issues on **1-31-2000**.

IT IS FURTHER ORDERED affirming that simultaneous supplemental disclosures shall be filed 45 days thereafter, on **3-16-2000**.

IT IS FURTHER ORDERED setting the deadline for filing the Motions for Summary Judgment Re Effect of Globe Equity 59 Decree on members of the FID, GVID and the San Carlos Apache Tribe on **5-26-2000**.

IT IS FURTHER ORDERED that response and reply times shall be determined under Pretrial Order No. 1 as follows: Responses shall be filed by **7-5-2000**; Replies shall be filed by **7-31-2000**.

As to Status of Updating the San Pedro HSR:

Mr. Barry requested that comments be allowed by the parties after ADWR files its report to the Court on 9-15-99.

IT IS ORDERED granting 30 days for the parties to file their comments on the September report from ADWR.

Re the San Carlos Settlement:

The Court stated that the Special Master's interim report will indicate when the objections are due and a hearing date on any objections to the report will be set by minute entry.

9:50 a.m. Court adjourns.

* * *

Appendix J

A copy of this minute entry is mailed to all parties on the Court-approved W-1, W-2, W-3 and W-4 mailing list dated 8-9-99. This is also the Court-approved mailing list for W1-203.

Also, a copy of this minute entry is mailed to all parties on the Court-approved W1-204 mailing list dated 8-19-99.

APPENDIX K — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

USCS Const. Art. IV, § 1

Sec. 1. Full Faith and Credit.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

USCS Const. Amend. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

USCS Const. Amend. 14, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C.S. § 1738

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Appendix K

43 USCS § 666

§ 666. Suits for adjudication of water rights

(a) Joinder of United States as defendant; costs. Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons. Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State. Nothing in this section shall be construed as authorizing the joinder of the United

States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

A.R.S. § 45-252 (2006)

§ 45-252. General adjudication; representation; superior court; assignment to judge; petition

A. One or more water users upon a river system and source, the water rights of which have not been previously adjudicated under this article and administered by the director of water resources, or the state of Arizona upon the request of any state agency other than the department of water resources may file a petition to have determined in a general adjudication the nature, extent and relative priority of the water rights of all persons in the river system and source.

B. The attorney general shall represent the state of Arizona in connection with all water claims asserted by this state. The director shall be represented by legal counsel retained in accordance with section 45-104, subsection F.

C. The general adjudication shall be brought and maintained in the superior court in the county in which the largest number of potential claimants resides. The clerk of the court in which the petition is filed shall notify the supreme court and the supreme court shall be responsible for assigning

the general adjudication to a superior court judge and appointing a master and for consolidating the general adjudication with other pending general adjudications, if appropriate.

D. The petition for a general adjudication shall be captioned: "In re the general adjudication of all rights to use water in the _____ river system and source" and shall request that the court determine the nature, extent and relative priority of the water rights of all persons in the river system and source.

APPENDIX L — RESTATEMENT OF THE LAW, SECOND, JUDGMENTS

§ 38 Parties Aligned on the Same Side

Parties who are not adversaries to each other under the pleadings in an action involving them and a third party are bound by and entitled to the benefits of issue preclusion with respect to issues they actually litigate fully and fairly as adversaries to each other and which are essential to the judgment rendered.

* * * *

§ 41 Person Represented by a Party

(1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is:

(a) The trustee of an estate or interest of which the person is a beneficiary; or

(b) Invested by the person with authority to represent him in an action; or

(c) The executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary; or

(d) An official or agency invested by law with authority to represent the person's interests; or

(e) The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.

(2) A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process.

Exceptions to this general rule are stated in § 42.

* * * *

§ 42 Exceptions to the General Rule of Representation

(1) A person is not bound by a judgment for or against a party who purports to represent him if:

(a) Notice concerning the representation was required to be given to the represented person, or others who might act to protect his interest, and there was no substantial compliance with the requirement; or

(b) The subject matter of the action was not within the interests of the represented person that the party is responsible for protecting; or

(c) Before rendition of the judgment the party was divested of representative authority with respect to the matters as to which the judgment is subsequently invoked; or

(d) With respect to the representative of a class, there was such a substantial divergence of interest between him and the members of the class, or a group within the class, that he could not fairly represent them with respect to the matters as to which the judgment is subsequently invoked; or

(e) The representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent.

(2) A person who has litigated on his own behalf in a previous action is not bound by or entitled to the benefits of a judgment in a subsequent action concerning the same claim that is brought or defended by a party representing him.

COMMENTS & ILLUSTRATIONS: Comment:

* * *

(f) Representative's inadequate conduct of litigation. The failure of a representative to invoke all possible legal theories or to develop all possible resources of proof does not make his representation legally ineffective, any more than

such circumstances overcome the binding effect of a judgment on a party himself. On the other hand, a fiduciary does not bind those for whom he acts as against third parties who are aware of the fiduciary's failure to fulfill his responsibility. As applied to litigation, this principle implies that a judgment is not binding on the represented person where it is the product of collusion between the representative and the opposing party, or where, to the knowledge of the opposing party, the representative seeks to further his own interest at the expense of the represented person. Where the representative's management of the litigation is so grossly deficient as to be apparent to the opposing party, it likewise creates no justifiable reliance interest in the adjudication on the part of the opposing party. Tactical mistakes or negligence on the part of the representative are not as such sufficient to render the judgment vulnerable. In actions by or against the representative of a class, the thoroughness and vigor of the representation is properly subject to particular scrutiny because the bonds of responsibility between the representative and those for whom he acts are transitory and ordinarily not otherwise readily enforcible. Similar scrutiny is appropriate concerning the adequacy of representation in actions by or against a public agency or official where the judgment would have preclusive effects in an action by citizens or taxpayers concerning the same subject matter. See § 41, Comment d. In any event,

whether the representation has been inadequate is a question of fact to be decided in light of the issues presented in the case and the factual and legal contentions that might reasonably have been expected to be presented.

§ 78 Relief by Motion

Relief from a judgment must be obtained by means of a motion for that purpose in the court that rendered the judgment unless relief may be obtained more fully, conveniently, or appropriately by some other procedure.

* * * *

§ 87 Effect of Federal Court Judgment in a Subsequent Action

Federal law determines the effects under the rules of res judicata of a judgment of a federal court.

* * * *

APPENDIX M — TREATY WITH THE APACHES. JULY 1, 1852

FRANKLIN PIERCE,

PRESIDENT OF THE UNITED STATES OF AMERICA:

To all and singular to whom these presents shall come, greeting:

Whereas a Treaty was made and concluded at Santa Fé, New Mexico, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U. S. A, commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Captain Simon, Captain Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States, which treaty is in the words following, to wit:

Articles of a Treaty made and entered into at Santa Fé, New Mexico, on the first day of July in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U. S. A., commanding the 9 Department and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas, Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache Nation of Indians, situate and living within the limits of the United States.

Appendix M

Article 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit.

Article 2. From and after the signing of this Treaty hostilities between the contracting parties shall forever cease, and perpetual peace and amity shall forever exist between said Indians and the government and people of the United States; the said nation, or tribe of Indians, hereby binding themselves most solemnly never to associate with or give countenance or aid to any tribe or band of Indians, or other persons or powers, who may be at any time at war or enmity with the government or people of said United States.

Article 3. Said nation, or tribe of Indians, do hereby bind themselves for all future time to treat honestly and humanely all citizens of the United States, with whom they may have intercourse, as well as all persons and powers, at peace with the said United States, who may be lawfully among them, or with whom they may have any lawful intercourse.

Article 4. All said nation, or tribe of Indians, hereby bind themselves to refer all cases of aggression against themselves or their property and territory, to the government of the United States for adjustment, and to conform in all things to the laws, rules, and regulations of said government in regard to the Indian tribes.

Article 5. Said nation, or tribe of Indians, do hereby bind themselves for all future time to desist and refrain from

making any "incursions within the Territory of Mexico" of a hostile or predatory character; and that they will for the future refrain from taking and conveying into captivity any of the people or citizens of Mexico, or the animals or property of the people or government of Mexico; and that they will, as soon as possible after the signing of this treaty, surrender to their agent all captives now in their possession.

Article 6. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Apache Indian or Indians, he or they shall be arrested and tried, and upon conviction, shall be subject to all the penalties provided by law for the protection of the persons and property of the people of the said States.

Article 7. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

Article 8. In order to preserve tranquillity and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading houses at such times and places as the said government may designate.

Article 9. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's that the government of

the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

Article 10. For and in consideration of the faithful performance of all the stipulations herein contained, by the said Apache's Indians, the government of the United States will grant to said Indians such dona-tions, presents, and implements, and adopt such other liberal and humane measures as said government may deem meet and proper.

Article 11. This Treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction, at all times and in all places, to the end that the said Apache Indians shall not be held responsible for the conduct of others, and that the go-vernment of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

In faith whereof we the undersigned have signed this Treaty, and af-fixed thereunto our seals, at the City of Santa Fé, this the first day of July in the year of our Lord one thousand eight hundred and fifty-two.

Appendix M

Witnesses:
F.A. Cunningham,
Paymaster, U.S.A.

J.C. McFerran,
1st Lt. 3d Inf. Act. Ast. Adj. Gen.
Caleb Sherman.
Fred Saynton.
Chas. McDougall,
Surgeon, U.S.A.
S.M. Baird,
Witness to the signing of Mangus Colorado.
John Pope,
Bvt. Capt. T.E.

E.V. Sumner, [Seal]
Bvt. Col. U.S.A. con'g 9th Dept. In charge of Executive Office of New Mexico.
John Greiner, [Seal]
Act. Supt. Indian Affairs, New Mexico.
Capitan Vuelta, his x mark [Seal]
Cuentas Azules, his x mark [Seal]
Blancito ——, his x mark [Seal]
Negrito ——, his x mark [Seal]
Capitan Simon, his x mark [Seal]
Mangus Colorado, his x mark [Seal]

And whereas the said Treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the twenty-third day of March, one thousand eight hundred and fifty-three, advise and consent to the ratification of its articles, by a resolution in the words and figures following, to wit:

Appendix M

In Executive Session, Senate of the United States,

March 23d, 1858.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the Articles of a Treaty made and entered into at Santa Fé New Mexico, on the first day of July, in the year of our Lord, 1852, by and between Colonel E. V. Sumner, United States Army, commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States.

Attest — Asbury Dickens, *Secretary.*

Now, therefore, be it known, that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the twenty-third day of March, one thousand eight hundred and fifty-three, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be herewith affixed, having signed the same with my hand.

Appendix M

Done at the city of Washington, this twenty-fifth day of March, in the year of our Lord one thousand eight hundred and fifty-three, and of the Independence of the United States the seventy-seventh.

FRANKLIN PIERCE.

By the President:

W. L. Marcy, *Secretary of State.*

APPENDIX N — EXCERPTS OF OPENING BRIEF FOR UNITED STATES

No. WC-02-0003-IR

IN THE SUPREME COURT
FOR THE STATE OF ARIZONA

IN RE: THE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER
IN THE GILA RIVER SYSTEM AND SOURCE

Maricopa County Nos. W-1, W-2, W-3, W-4
(Consolidated)

[Contested Case No. W1-206]

OPENING BRIEF FOR THE UNITED STATES

KELLY A. JOHNSON
Acting Assistant Attorney General
PATRICK BARRY (006056)
JOHN L. SMELTZER
Attorneys, Department of Justice
Environment & Natural Resources Division
Post Office Box 23975
Washington, D.C. 20026-3795
(202) 305-0343

On the other hand, as also explained *supra*, the Superior Court did not in any way address the Apaches' argument under Section 42(1)(e).[35] In particular, the Superior Court did not determine whether the exception applies in cases involving tribal representation by the United States,[36] what sort of showing is necessary to establish the exception, or whether there is a sufficient factual basis to establish the exception in this case. In these circumstances, we agree with the Apaches that a remand for further proceedings would be

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35. The Superior Court did not address any Apache-specific issues in its summary disposition in W1-206 and did not address Section 42(1)(e), as a matter of law, in its memorandum ruling in W1-203, as GRIC did not argue inadequate representation.

36. In *Truckee-Carson*, the Ninth Circuit determined that the Pyramid Lake Paiute Tribe could assert such an exception to *res judicata*, but rejected the exception on the facts. *See* 649 F.2d at 1307-8. There, the trial court had found, among other things, that "any impropriety in the government's representation 'was unknown to the defendants in Orr Ditch.'" *Id.* at 1308. After stating that this finding was not "clearly erroneous," the Ninth Circuit held that an essential element of the Section 42(1)(e) exception was not established. *Ibid.* On *certiorari*, the Supreme Court rejected a somewhat similar argument raised by the Pyramid Lake Paiute Tribe under Section 42(1)(d) of the Restatement (Second) of Judgments, which establishes an exception to claim preclusion in cases of conflict of interest. *See Nevada*, 463 U.S. at 135, n. 15. However, the Supreme Court did not address the "quality of representation the Tribe received." *See id.* at 135, n. 14. Nor did the Court expressly address Section 42(1)(e). *But see id.* at 144, n. 16 (stating, without citation, that if the government "violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties").

appropriate. Among other things, to determine whether the United States exercised "due diligence and reasonable prudence" in prosecuting the Globe Equity Decree on behalf of the Apaches or whether the Globe Equity defendants were aware of any representational failures on the part of the United States, a court would have to "weigh the quality" of reams of documentary evidence presented by the parties and "choose among competing or conflicting inferences" to be drawn from this evidence. *See Orme School*, 166 Ariz. at 311, 802 P.2d at 1010. This Court should not engage in such factual determinations in this appeal. Rather, these are matters for the trial court to decide, in the first instance, following an evidentiary hearing, and not on summary judgment. *Ibid.*

In short, this Court should remand the matters pertaining to the Apaches' argument under Section 42(1)(e) to the Superior Court, after resolving the other issues in this appeal. The United States reserves the right to offer a factual rebuttal, as appropriate, in any future proceedings on remand or otherwise.

IV. *Re Issue Four:* THE UNITED STATES WAS AUTHORIZED TO REPRESENT THE APACHES IN THE GLOBE EQUITY PROCEEDINGS

The United States also opposes the Apaches' argument *(Brief* at 68-71) that the United States lacked authority to litigate the Apaches' federally reserved water rights or enter the Globe Equity Decree on the Apaches' behalf. In 1893, Congress enacted legislation providing that:

* * * *

APPENDIX O — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED JULY 10, 1990 AND FILED JULY 16, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GLOBE EQUITY NO. 59 (JCC)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GILA RIVER INDIAN COMMUNITY,

Plaintiff in Intervention,

vs.

GILA VALLEY IRRIGATION DISTRICT, et al.,

Defendants.

ORDER

Hearing on Pending Motions:

Counsel state their appearance for the Court (see attached sign in sheet) and make statements to the Court. Attorney Anthony Fines withdraws his objection to Count I on the Motion For Intervention.

Appendix O

The Court rules as follows on the Gila Indian Community's Motion To Clarify Findings of Fact and Conclusions of Law:

Conclusion #23 — DENIED

Conclusions #39-42 — DENIED

Conclusion #41 — DENIED

Conclusion #46 — GRANTED

Conclusion #1 — DENIED

Conclusion #12 — DENIED with the understanding that the question may be litigated.

Conclusion #47 — Should read: "He uses a factor of .7, assuming that this 70% will represent evaporation from the lake. This results in inches of evaporation."

IT IS ORDERED:

The Motion To Dismiss Count VIII of the Amended Complaint in Intervention is DENIED;

The Motion To Stay Count VIII is GRANTED;

The Motion To File an Amicus Brief is GRANTED;

Upper Valley Defendants' Motion To Dismiss Count VIII or conduct separate trials is DENIED AS MOOT;

Upper Valley's Motion To Dismiss Count IX is DENIED.

Appendix O

IT IS FURTHER ORDERED that Plaintiff is to amend the statements of it's claim specifically setting forth the claim being made, within NINETY (90) DAYS from the date of this Order. After Count IX is amended, Upper Valley Defendants are to prepare a Notice to the Defendants stating the Court's disposition of Count VIII, and further stating that there will be no class representation as to that Count.

San Carlos Apache Tribe's Motion For Intervention is GRANTED on all Counts; and is STAYED as to Count VI.

Attorney Cox's Motion To Serve Notice of the Amended Claim on parties who have already answered in this matter is DENIED; Attorney Cox must reply to Counterclaimant or move to dismiss against Counterclaimant with THIRTY (30) DAYS of the date of this Order.

IT IS FURTHER ORDERED that all discovery is stayed until Count IX is reinstated.

IT IS FURTHER ORDERED that the Court approves the expert fees incurred by Ms. Winkelman at the rate of $20.00 per hour for 23 hours.

IT IS FURTHER ORDERED that this matter is set for trial on MAY 13, 1991, (estimated time of trial is 2 weeks) regarding issues relating to Upper Valley and all counterclaims.

DATED this 10 day of July, 1990.

s/ John C. Coughenour
John C. Coughenour
UNITED STATES DISTRICT JUDGE

APPENDIX P — MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED AUGUST 7, 1990 AND FILED AUGUST 14, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CASE NO. Globe Equity No. 59

UNITED STATES OF AMERICA,

Plaintiff,

v.

GILA VALLEY IRRIGATION DISTRICT, et al.,

Defendants.

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Hon. John C. Coughenour, U. S. District Judge:

The United States' motion for clarification is GRANTED. The stay granted regarding the plaintiffs in intervention count VIII of the amended complaint is extended to the analogous groundwater pumping claim brought by the United States.

Filed and entered this 7th day of August, 1990.

BRUCE RIFKIN, Clerk
by s/ Julie Mahnke
Deputy Clerk

APPENDIX Q — ORDER ON MOTION TO REVERSE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED OCTOBER 19, 1990 AND FILED OCTOBER 24, 1990

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

GLOBE EQUITY NO. 59 (JCC)

UNITED STATES OF AMERICA,

Plaintiff,

and

GILA RIVER INDIAN COMMUNITY,

Plaintiff in Intervention,

and

SAN CARLOS APACHE TRIBE,

Plaintiff in Intervention,

v.

GILA VALLEY IRRIGATION DISTRICT, et al.,

Defendants.

Appendix Q

ORDER ON MOTION TO REVERSE

The San Carlos Apache Tribe's Motion to Reverse the Court's "Colorado River" Stay Order of Count VI of its Complaint in Intervention is **DENIED**.

The Clerk of this Court is directed to send uncertified copies of this Order to all counsel of record.

DATED this 19 day of October, 1990.

s/ John C. Coughenour
John C. Coughenour
United States District Judge

APPENDIX R — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED MAY 10, 1999 AND FILED MAY 13, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CASE NO. Globe Equity No. 59

UNITED STATES OF AMERICA,

Plaintiff,

and

GILA RIVER INDIAN COMMUNITY,

Plaintiff in Intervention,

and

SAN CARLOS APACHE TRIBE,

Plaintiff in Intervention,

v.

GILA VALLEY IRRIGATION DISTRICT, et, al.,

Defendants.

ORDER

The San Carlos Apache Tribe has filed a complaint against the parties operating the San Carlos Reservoir asserting claims under the Endangered Species Act, the Native American Graves Protection and Repatriation Act,

and common law nuisance. The complaint does not state a claim based on water rights granted by the Gila River Decree. The Court, therefore, declines its jurisdiction to hear this matter under Globe Equity No. 59 and dismisses the complaint without prejudice. If it appears that the Decree may need to be modified based on the resolution of these claims by another court, the parties may petition this Court at that time.

SO ORDERED, this 10 day of May, 1999.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

APPENDIX S — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DENYING MOTION TO RECONSIDER DATED AND FILED JULY 16, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(CIVIL MINUTES-GENERAL)

Civil Case No. E59 - GLOBE EQUITY (JCC)

Date: July 16, 1990

HONORABLE JOHN C. COUGHENOUR

IT IS ORDERED that the United States' motion to reconsider or to certify under Rule 54(b) is DENIED.

APPENDIX T — MINUTE ORDER OF THE UNITED STATES DISTRICT COURT DISTRICT OF ARIZONA DATED AUGUST 7, 1990 AND FILED AUGUST 14, 1990

CASE NO. Globe Equity No. 59

UNITED STATES OF AMERICA,

Plaintiff,

v.

GILA VALLEY IRRIGATION DISTRICT, et al.,

Defendants.

The following Minute Order is made by direction of the Court, the Hon. John C. Coughenour, U. S. District Judge:

The United States' motion for clarification is GRANTED. The stay granted regarding the plaintiffs in intervention count VIII of the amended complaint is extended to the analogous groundwater pumping claim brought by the United States.

Filed and entered this 7th day of August, 1990.

BRUCE RIFKIN, Clerk

by s/ Julie Mah[illegible]
Deputy Clerk

APPENDIX U — CIVIL MINUTES — GENERAL OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED AND FILED JULY 16, 1990

UNITED STATES DISTRICT OF ARIZONA

(CIVIL MINUTES-GENERAL)

Civil Case No. E59 - GLOBE EQUITY (JCC) Date: July 16, 1990

HONORABLE JOHN C. COUGHENOUR

IT IS ORDERED that the United States' motion to reconsider or to certify under Rule 54(b) is DENIED.

APPENDIX V — ORDER OF THE HONORABLE JOHN C. COUGHENOUR OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED JULY 10, 1990 AND FILED JULY 16, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GLOBE EQUITY NO. 59 (JCC)

ORDER

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GILA RIVER INDIAN COMMUNITY,

Plaintiff in Intervention,

vs.

GILA VALLEY IRRIGATION DISTRICT, et al.,

Defendants.

Hearing on Pending Motions:

Counsel state their appearance for the Court (see attached sign in sheet) and make statements to the Court. Attorney Anthony Fines withdraws his objection to Count I on the Motion For Intervention.

Appendix V

The Court rules as follows on the Gila Indian Community's Motion To Clarify Findings of Fact and Conclusions of Law:

Conclusion #23 - DENIED

Conclusions #39-42 - DENIED

Conclusion #41 - DENIED

Conclusion #46 - GRANTED

Conclusion #1 - DENIED

Conclusion #12 - DENIED with the understanding that the question may be litigated.

Conclusion #47 - Should read: "He uses a factor of .7, assuming that this 70% will represent evaporation from the lake. This results in inches of evaporation."

IT IS ORDERED:

The Motion To Dismiss Count VIII of the Amended Complaint in Intervention is DENIED;

The Motion To Stay Count VIII is GRANTED;

The Motion To File an Amicus Brief is GRANTED;

Appendix V

Upper Valley Defendants' Motion To Dismiss Count VIII or conduct separate trials is DENIED AS MOOT;

Upper Valley's Motion To Dismiss Count IX is DENIED.

IT IS FURTHER ORDERED that Plaintiff is to amend the statements of it's claim specifically setting forth the claim being made, within NINETY (90) DAYS from the date of this Order. After Count IX is amended, Upper Valley Defendants are to prepare a Notice to the Defendants stating the Court's disposition of Count VIII, and further stating that there will be no class representation as to that Count.

San Carlos Apache Tribe's Motion For Intervention is GRANTED on all Counts; and is STAYED as to Count VI.

Attorney Cox's Motion To Serve Notice of the Amended Claim on parties who have already answered in this matter is DENIED; Attorney Cox must reply to Counterclaimant or move to dismiss against Counterclaimant with THIRTY (30) DAYS of the date of this Order.

IT IS FURTHER ORDERED that all discovery is stayed until Count IX is reinstated.

IT IS FURTHER ORDERED that the Court approves the expert fees incurred by Ms. Winkelman at the rate of $20.00 per hour for 23 hours.

Appendix V

IT IS FURTHER ORDERED that this matter is set for trial on MAY 13, 1991, (estimated time of trial is 2 weeks) regarding issues relating to Upper Valley and all counterclaims.

DATED this 10 day of July, 1990.

John C. Coughenour
UNITED STATES DISTRICT JUDGE

APPENDIX W — ORDER ON MOTION TO REVERSE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED OCTOBER 19, 1990 AND FILED OCTOBER 22, 1990

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

GLOBE EQUITY NO. 59 (JCC)

ORDER ON MOTION TO REVERSE

UNITED STATES OF AMERICA,

Plaintiff,

and

GILA RIVER INDIAN COMMUNITY,

Plaintiff in Intervention,

and

SAN CARLOS APACHE TRIBE,

Plaintiff in Intervention,

v.

GILA VALLEY IRRIGATION DISTRICT, et al.,

Defendants.

Appendix W

The San Carlos Apache Tribe's Motion to Reverse the Court's "Colorado River" Stay Order of Count VI of its Complaint in Intervention is **DENIED.**

The Clerk of this Court is directed to send uncertified copies of this Order to all counsel of record.

DATED this 19 day of October, 1990.

s/ John C. Coughenour
John C. Coughenour
United States District Judge

APPENDIX X — ORDER OF THE UNITED STATES DISTRICT COURT DISTRICT OF ARIZONA DATED MAY 10, 1999 AND FILED MAY 13, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CASE NO. Globe Equity No. 59

ORDER

UNITED STATES OF AMERICA,

Plaintiff,

and

GILA RIVER INDIAN COMMUNITY,

Plaintiff in Intervention,

and

SAN CARLOS APACHE TRIBE,

Plaintiff in Intervention,

v.

GILA VALLEY IRRIGATION DISTRICT, et, al.,

Defendants.

Appendix X

The San Carlos Apache Tribe has filed a complaint against the parties operating the San Carlos Reservoir asserting claims under the Endangered Species Act, the Native American Graves Protection and Repatriation Act, and common law nuisance. The complaint does not state a claim based on water rights granted by the Gila River Decree. The Court, therefore, declines its jurisdiction to hear this matter under Globe Equity No. 59 and dismisses the complaint without prejudice. If it appears that the Decree may need to be modified based on the resolution of these claims by another court, the parties may petition this Court at that time.

SO ORDERED, this 10 day of May, 1999.

s/ John C. Coughenour
UNITED STATES DISTRICT JUDGE

ORDER — 1

APPENDIX Y — EXCERPT FROM STATEMENT OF POSITION OF ARIZONA IN THE SUPREME COURT OF THE UNITED STATES

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1955

NO. 10 ORIGINAL

STATEMENT
OF POSITION OF ARIZONA

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

UNITED STATES OF AMERICA,

Intervener.

STATE OF NEVADA,

Intervener.

STATES OF NEW MEXICO AND UTAH,

Impleaded.

Appendix Y

STATEMENT OF POSITION OF ARIZONA

JOHN H. MOEUR,
Chief Counsel

Arizona Interstate Stream
Commission

JOHN P. FRANK
JOHN GEOFFREY WILL
BURR SUTTER
PERRY LING

THEODORE KIENDL
For the Arizona Interstate
Stream Commission

ROBERT MORRISON,
Attorney General of Arizona

[Commencing at page 4]

* * *

A. Affirmative Issues Raised by Arizona.

(1) The first issue raised by Arizona in its Complaint arises out of that provision of the California Limitation Act which limits California to 4.4 m.a.f. "of the waters apportioned to the Lower Basin States by paragraph (a) of Article III of the Compact plus not more than one-half of any excess or surplus waters unapportioned by said Compact". If the III(b) water is "excess or surplus waters

unapportioned" then California is entitled to claim up to one-half of that amount.[3] Otherwise they are barred altogether from the III(b) water.

The question therefore simmers down to whether III(b) water is or is not "excess or surplus waters unapportioned". The short answer for this immediate purpose is that Mr. Justice Brandeis in *Arizona v. California*, 292 U.S. 341 at pp. 357-359 [5] (1934), repeatedly describes the III(b) water as "apportioned". Nevada, New Mexico and Utah agree that III (b) waters are "apportioned".

(2) The second central issue is the method of measurement to be applied to the internal waters of Arizona, notably the Gila. We remind the Master of our basic formula — our 3.8 m.a.f. is made up of 2.8 m.a.f. contract main stream water and 1.0 m.a.f. internal non-contract water. If the 1.0 m.a.f. is increased (California says it should be 2.0 m.a.f.) our 2.8 m.a.f. would be correspondingly reduced; if our method of measure is used, we are safely within our formula.

Without question, Arizona achieves use (to be distinguished from "beneficial consumptive use") of Gila River System water in excess of 1,000,000 acre feet a year. Its uses add up to far more water than the Gila would ever contribute to the Colorado River itself under natural conditions. Indeed, by marvels of ingenuity, it uses from the Gila more water than there is in the river, measured at any point. This is achieved by two devices: First, the works in the higher reaches of the Gila River System conserve water

3. Please note that the exception would permit them to claim up to that amount, not receive that amount.

which would otherwise be wasted by evaporation, transpiration or channel losses — this is what is called "salvage". Second, the processes of irrigation not merely take water from the river but also let water come back to the river and this water in turn is taken out again and again before the last use has been made. The familiar phrase of the Chicago meatpackers is: "We use all the pig but the squeal." To mix the metaphor, Arizona uses all the water including the squeal and then uses the squeal twice.

This puts the legal issue of the definition of "beneficial consumptive use", the term applicable to measuring the water use of each state. Arizona contends that the measure is in terms of main stream depletion — i.e., that it "beneficially uses" only the amount which it takes that would otherwise have reached the Colorado. California contends that the measure is actual diversions.

* * * *